

**Duke University,**

**Employer,**

**and**

**Washington-Baltimore News Guild, Local**  
**32035**

**Petitioner.**

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 7**

<b>Duke University,</b>	)	
	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	<b>Case No. 10-RC-276475</b>
	)	
<b>Washington-Baltimore News Guild, Local</b>	)	
<b>32035</b>	)	
	)	
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<b>Petitioner.</b>	)	
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**DUKE UNIVERSITY’S  
POST-HEARING BRIEF ON OBJECTIONS AND CHALLENGES**

This case involves serious infirmities in a National Labor Relations Board (“NLRB” or “Board”) election conducted by Region 10, Subregion 11 (the “Region”).<sup>1</sup> Duke University (“Employer”) and the Washington-Baltimore News Guild, Local 32035 (“Union” or “Petitioner”) stipulated to a mixed manual/mail election. (JX-2, pp. 11-16).<sup>2</sup> After the Region mailed ballots, however, a chain of events commenced resulting in impermissible breakdowns of the election process. Such events included: (1) the Region’s failure to include return envelope postage in mail ballot kits; (2) insufficient time allotted for return of ballots under a postponed ballot return

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<sup>1</sup> References to “the Region” in this Brief refer to Region 10, Subregion 11, unless otherwise specified.

<sup>2</sup> This Brief utilizes the following citation conventions: (JX-\_) refers to Joint Exhibits offered and admitted into the record; (BX-\_) refers to Board Exhibits offered and admitted into the record; (PX-\_) refers to Petitioner Exhibits offered and admitted into the record; (EX-\_) refers to Employer Exhibits offered and admitted into the record; and (Tr. \_\_:\_\_) refers to pages and line numbers of the Transcript of Hearing.



deadline unilaterally imposed by the Region; (3) breach of the parties' Stipulated Election Agreement due to the Region's failure to obtain agreement from the parties on the postponement; and (4) two technological issues during the ballot count that inhibited full observation of proceedings by the parties.

Additionally, three (3) challenged ballots remain pending for resolution. Of those challenges, Michael Cornett's ballot should be counted because he is a dual function employee regularly performing work within the bargaining unit, while the ballots of Drew Sisk and Kristen Twardowski should not be counted due to temporary employee status and voluntary resignation, respectively.

As a result, pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, the Employer submits this Post-Hearing Brief and respectfully requests Region 7 to: (1) sustain the Employer's Objections; (2) order a re-run election; (3) find Michael Cornett eligible to vote; (4) find Drew Sisk ineligible to vote; and (5) find Kristen Twardowski ineligible to vote.

## **I. Procedural Background**

The Petitioner filed the instant Petition on May 3, 2021. (JX-1). On May 13, 2021, the parties and entered into a Stipulated Election Agreement for a mixed manual/mail election to determine whether employees working in the Duke University Press wish to be represented by the Petitioner. (JX-2 pp. 11-16). Pursuant to that Agreement, the Region conducted a manual election session on June 2, 2021, and also sent mail ballots on that date, due for receipt by the Region on June 21, 2021 with the ballot count scheduled for the following day. (*Id.*).

On June 11, 2021, the Region reset both the ballot receipt deadline and the ballot count date for June 29, 2021, due to administrative failures in the mail ballot process. (JX-3). The June

29, 2021 ballot count via videoconference, discussed in further detail below, resulted in determinative challenges and an initial count of:

35 Yes  
31 No  
1 Void  
8 Challenged Ballots

(JX-4).

The parties challenged ballots as follows:

<u>Name</u>	<u>Challenged By</u>	<u>Reason</u>
Drew Sisk	Board	Not on List
Michael Cornett	Union	Not in Unit
Lynn Furges	Union	Confidential Employee
Kelly Andrus	Union <sup>3</sup>	Supervisor
Lisa Savage	Union	Supervisor
Christine Critelli	Union	Supervisor
Kristen Twardowski	Employer	Voluntary Quit
Hannah Willoughby-Harris	Employer	Supervisor

(BX-1(b)).

At hearing, the Union withdrew its challenges to the ballots of Christine Critelli (Tr. 11:8-11), Kelly Andrus (*Id.*), Lisa Savage (Tr. 237:24-238:2), and Lynn Furges (Tr. 237:20-23), while the Employer withdrew its challenge to the ballot of Hannah Willoughby-Harris (Tr. 10:24-11:7).

As a result, the parties ultimately addressed the three (3) remaining challenges at hearing:

<u>Name</u>	<u>Challenged By</u>	<u>Reason</u>
Drew Sisk	Board	Not on List
Michael Cornett	Union	Not in Unit
Kristen Twardowski	Employer	Voluntary Quit

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<sup>3</sup> Region 7's July 28, 2021 Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections stated, in addition to the Union's supervisory challenge, the Board also challenged Andrus as "[p]ossible that voter attempted to vote twice." (BX-1(c)). As both parties confirmed at hearing, this statement is inaccurate because the Board raised no such challenge or assertion during the ballot count. (Tr. 11:8-12:21). The Union has withdrawn its challenge to Andrus's ballot, and the parties agree her ballot should be counted. (*Id.*). Additionally, Andrus testified she only attempted to vote once. (Tr. 124:11-18).

(Tr. 237:4-239:22).

In addition to the challenged ballots, on July 7, 2021 the Employer timely filed the following Objections to conduct affecting the results of the election:

OBJECTION #1: The Region failed to include return postage on its initially sent mail ballot return envelopes, thus undermining laboratory conditions and preventing the administration of a free and fair election.

OBJECTION #2: The Region impermissibly and unilaterally reset the mail ballot return deadline and ballot count date without agreement of the parties, absent Stipulated Election Agreement language permitting the Region to implement such unilateral changes.

OBJECTION #3: The Region's reset June 29, 2021 ballot receipt deadline provided insufficient additional time to remedy the absence of return postage on initial mail ballot return envelopes, thus undermining laboratory conditions and preventing the administration of a free and fair election.

OBJECTION #4: During the portion of the June 29, 2021 videoconference ballot count in which the parties reviewed duplicate mail ballots and in-person challenges, the Board agent conducting the count left the Zoom meeting due to technical issues for approximately seven (7) to ten (10) minutes, thus transferring control of the ballot count videoconference to a Union observer, and removing ballots and ballot envelopes in various stages of processing from the parties' view.

OBJECTION #5: During the portion of the June 29, 2021 videoconference ballot count in which the Board agent counted ballots, the Board agent conducting the count lost audio connection with the Zoom meeting due to technical issues for approximately five (5) to seven (7) minutes, resulting in the agent making no audible call of the preference expressed (or potential void/valid determination) of at least two (2) ballots.

Following transfer of the instant case from Region 10, Subregion 11 to Region 7 (BX-1(b)), the parties addressed by the Objections and the three (3) pending challenges in a videoconference hearing conducted on August 10, 2021 and August 19, 2021. The Employer now respectfully requests Region 7 to sustain the Employer's Objections and order a re-run election, and also to count the ballot of Michael Cornell while excluding as ineligible the ballots of Drew Sisk and Kristen Twardowski.

**II. The Employer's Objections to the Election Establish Objectionable Procedural Deficiencies Warranting a Re-Run Election.**

**A. The Region's Failure to Include Postage on Return Envelopes Undermined Laboratory Conditions and Prevented the Administration of a Free and Fair Election**

In contrast with manual elections, the absence of direct Board supervision over employees' voting in mail ballot elections makes such elections "more vulnerable to the destruction of laboratory conditions." *Mission Industries*, 283 NLRB 1027 (1987). To mitigate the increased risk posed by mail ballot elections, "the Board has adopted mail ballot election procedures . . . designed to preserve the integrity of the election process and to ensure that no reasonable doubt is raised about the fairness or validity of that process." *Id.*

Here, the mail ballot process failed in multiple ways – most directly due to the lack of postage on mail ballot return envelopes – thus casting significant doubt on the fairness and validity of the election. The absence of postage on every mail ballot return envelope initially sent by the Region to voters is not in dispute, as both parties' witnesses acknowledged this problem occurred. (JX-3) (EX-5) (Tr. 36:3-21, 108:4-109:12, 110:25-111:5, 142:12-22, 183:21-184:7, 223:21-24).<sup>4</sup>

Compounding the error, the return envelopes stated on their faces:

NO POSTAGE NECESSARY  
POSTAGE HAS BE [sic] PREPAID BY  
NATIONAL LABOR RELATIONS BOARD  
SUBREGION 11  
4035 UNIVERSITY PKWY STE 200  
WINSTON SALEM NC 27106-2583

(EX-5) (Tr. 109:13-17, 183:21-184:7, 211:12-17).

This failure created significant consternation and concern within the unit about the integrity of the election, and the trustworthiness of the election process. (EX-3, 4) (Tr. 113:1-14, 122:14-

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<sup>4</sup> Section 11336.2(c) of the Board's Casehandling Manual in Representation Cases requires that mail ballot return envelopes be "postage-paid."

124:4, 144:8-24, 148:5-149:1, 229:19-230:). Voter La Tasha Cowden, for example, described the issue as “a hot topic within Duke University Press.” (Tr. 148:24-149:1). Union witness Dan Ruccia, meanwhile, described “confusion” and “disappointment” within the unit due to the postage failure. (Tr. 159:3-4, 184:8-14).

These concerns also resulted in email exchanges amongst unit employees regarding the issue, while voters Cowden and Kelly Andrus expressed to management their immediate position that the election must be re-run. (EX-3, 4). Cowden also sent an email to Board Agent Ingrid Jenkins expressing her concern and requesting that the election be re-run. (EX-6). Jenkins never responded to Cowden’s email. (Tr. 146:8-10).<sup>5</sup>

The nature and magnitude of the return postage problem justified these reactions amongst voters. The Board holds itself to far higher standards for the conduct of elections than those demonstrated here. Accordingly, procedural missteps of this nature by a Region constitute objectionable issues sufficient to require a re-run election. See, e.g., *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008) (ordering re-run where ballots were color-coded to signify two different units, but agent conducting the count was color blind, agent failed to properly display ballots during count, and agent also failed to properly secure ballots after the election); *Paprikas Fono*, 273 NLRB 1326 (1984) (ordering re-run where Regional staff opened sealed challenge envelope and examined challenges outside the presence of the parties); *Madera Enterprises, Inc.*, 309 NLRB 774 (1992) (same).

The failure of the Region to include postage on mail ballot return envelopes here constituted a clear procedural failure which, as Union witness Ruccia admitted, created confusion

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<sup>5</sup> Of note, Board agent Jenkins did respond to inquiries regarding this issue from Union supporter Roy Pattishall. (EX-3) (Tr. 114:2-115:7).

and disappointment amongst voters. This procedural deficiency not only interfered with employees' abilities to vote, but also undermined laboratory conditions by sowing doubts about the integrity of the process amongst the unit. As a result, Region 7 must sustain the Employer's Objection regarding the return postage issue, and order a re-run election.

**B. The Postponed Ballot Receipt Deadline Provided Employees Insufficient Time to Return Ballots**

Upon discovery of the return postage problem, the Region sent duplicate ballot packets and postponed the deadline for receipt of ballots by eight (8) days, until the start of the rescheduled ballot count on June 29, 2021. (JX-3). This postponement failed to account for delays in postal service inherent to both the Region's mailing of the duplicates, and the ballots' return journeys to the Regional Office.

During the videoconference mail ballot count, Board Agent Jenkins showed the parties' observers returned outer envelopes on the screen, and called out information including the postmark date and the Region's receipt time stamp. (Tr. 39:7-10, 82:18-83:14, 187:19-24, 198:1-11).<sup>6</sup> Based on that information, Employer observer Dean Smith testified the typical gap between the postmark dates and receipt time stamps was eight (8) to ten (10) days. (Tr. 39:11-40:15). Additionally, approximately 10% of the ballots arrived within only three (3) business days of the count. Two (2) ballots arrived during the count itself. (Tr. 40:21-41:7). Union witness and observer Ruccia testified regarding a significant postage delay for his initial ballot, which took ten (10) days to reach him when sent by the Region, and another ten (10) days to arrive at the Regional

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<sup>6</sup> Union observer Ruccia testified, contrary to Employer observer Dean Smith, that he did not recall Jenkins announcing the postmark date in addition to the receipt time stamp. (Tr. 187-19-24). In any event, though, Smith, Ruccia, and Union witness Kelsea Smith all agreed Jenkins visually showed the parties the fronts of the envelopes (the typical location for postmarks).

Office after he sent it. (Tr. 187:2-18). These delays accord with widespread reports of recent postal delays, particularly in North Carolina.<sup>7</sup>

Voter Lisa Savage experienced difficulties emblematic of this problem. After having her first ballot returned due to the lack of postage, she contacted Board Agent Jenkins on Friday, June 25, 2021 (two (2) business days before the Tuesday, June 29, 2021 ballot count, and over a week since Savage had mailed the ballot), seeking to confirm receipt of her ballot, for which she had added postage and re-sent. (EX-18) (Tr. 223:21-224:2, 225:13-229:18). Jenkins responded the ballot had not arrived, and upon further inquiry from Savage, suggested Savage drive her duplicate to the Regional Office in Winston-Salem, North Carolina (approximately two (2) hours) from Savage's home. (*Id.*). In response, Savage asked if she could place her ballot in a priority mail envelope, and Jenkins responded in the affirmative. (*Id.*). Savage's ballot finally arrived on Monday, June 28, 2021, only one (1) day before the count. (*Id.*).

The Union will argue these delays lack importance because the Regional ultimately received at least one ballot from all but three (3) eligible voters. (JX-4) (Tr. 212:8-19). As discussed in further detail below, however, the Tally of Ballots reflects a very close election, in which three (3) votes may well be determinative following resolution of challenges. Furthermore, even if 100% of eligible voters had submitted ballots, the evidence shows the Region's serious errors in administration of the election created such concerns about the integrity of the election process as to require correction through a re-run election. The possibility that determinative ballots were not counted because the Region did not sufficiently extend the ballot receipt deadline to account for postage delays (following its return envelope postage error), as well the significant

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<sup>7</sup> See, e.g., <https://spectrumlocalnews.com/nc/charlotte/politics/2021/08/27/mail-running-late--audit-shows-more-than-a-billion-pieces-of-mail-delayed-in-n-c-> .

doubt the Region's conduct cast upon the reliability of election procedures, warrant a re-run election in order to fully protect employee free choice.

**C. The Region's Unilateral Postponement of the Ballot Receipt Deadline Breached the Parties' Stipulated Election Agreement.**

As referenced above, after discovering the return postage issue, the Region issued an Order Rescheduling Ballot Count setting a rescheduled deadline for receipt of ballots, explaining it would send duplicate ballots, and rescheduling the count. (JX-3). Prior to doing so, however, the Region neither solicited the parties' positions on the matter, nor obtained their agreement. (JX-3) (Tr. 37:4-38:12, 185:13-187:1).<sup>8</sup> As a result, in addition to the insufficiency of the ballot receipt deadline's postponement, the Region also breached the parties' Stipulated Election Agreement by unilaterally altering the election arrangements.

The Stipulated Election Agreement contains no provision granting the Regional Director<sup>9</sup> authority to unilaterally change the parties' agreed-upon election arrangements in any circumstances other than *COVID-19 related* changes or cancellation of the *manual* (in-person) portion of the election. (JX-2, pp. 11-16). Moreover, that language standing alone does not confer any actual authority on the Regional Director due to its circular nature. Specifically, Section 4 of the Stipulated Election Agreement states:

If the Acting Regional Director determines that it is unsafe to conduct a manual election on the scheduled date, the Acting Regional Director may reschedule the

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<sup>8</sup> The Petitioner objected to Director Dean Smith's testimony that the Region never consulted the Employer nor obtained its agreement because Smith learned this information through counsel. (Tr. 37:4-38:12). The record establishes, however, that Smith was the Employer's primary non-attorney representative for purposes of NLRB proceedings, and that counsel kept him abreast of developments in the case. (Tr. 35:20-36:2). The Hearing Officer properly overruled the Petitioner's objection. (Tr. 38:8-10). Furthermore, even putting the testimony aside, the Order itself reflects no indication of consultation with the parties, nor any agreement. (JX-3).

<sup>9</sup> This Brief utilizes the term "Regional Director" to encompass the Acting Regional Director of Region 10, Subregion 11 at the time of the events in question.



date, time, place of the manual election and/or manner of election, including converting the election to a full mail ballot election. Note: [COVID-19] SAFETY PROTOCOLS

...

If the election and/or count is postponed or canceled, the Acting Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

(JX-2, pp. 11-12). No other portion of the Stipulated Election Agreement refers to altered election arrangements.

Under any reading of the above language, the Stipulated Election Agreement's references to rescheduling the election pertain only to COVID-19 related changes to the manual portion of the election. The second portion quoted can only refer back to the possibility of changes to the manual portion of the election, because otherwise that sentence is impossibly circular. Under this language, the condition precedent for the Regional Director's authority "in his or her discretion [to] reschedule the date, time, and place of the election" is: "[i]f the election and/or count is postponed or canceled[.]" The only reference anywhere in the Stipulated Election Agreement to circumstances in which the election and/or count may be "postponed or canceled" is the first segment cited above. Nothing in the Stipulated Election Agreement states, or even suggests, the Regional Director may implement such changes due to Regional Office errors in the mail ballot process.

A Regional Director's breach of a Stipulated Election Agreement constitutes grounds for setting aside an election. "The Board has long held that election agreements are 'contracts,' binding on the parties that executed them." *T & L Leasing*, 318 NLRB 324 (1995), citing *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968). Once a Stipulated Election Agreement is executed and approved, both the parties and the Regional Director are "clearly bound by its terms." *Id.* at 325 n. 6, citing *Summa Corp. v. NLRB*, 625 F.2d 623 (9th Cir. 1980). The Board's rationale for holding

the Regional Director to the express terms of a stipulated election agreement is simple: “it would be manifestly unfair to allow the Board to obtain all the procedural advantages that flow from gaining the other parties' consent yet to excuse it from living up to its part of the bargain.” *Id.* at 325 n. 6 (internal quotations omitted), quoting *NLRB v. Granite State Minerals*, 674 F.2d 101, 102 (1982). In short, the Employer “is entitled to insist that the Board and all parties adhere to provisions of the election stipulation that are designed to ensure a fair election.” *Summa Corp.*, 625 F.2d at 296.

“Because election agreements are regarded as contracts, the Board will set aside the election where a ‘material term’ of the agreement has been breached.” *T & L Leasing*, 318 NLRB at 325. Also due to the contractual nature of Stipulated Election Agreements, the Board first looks to the plain meaning of the agreement in assessing whether a Regional Director has committed a breach. *Windham Community Memorial Hospital*, 312 NLRB 54 (1993); see also *T & L Leasing*, 318 NLRB at 325.

In order to preserve the integrity of the election processes agreed upon by parties, the Board must insist on strict adherence to Stipulated Election Agreements as a matter of both policy and law. *T & L Leasing*, 318 NLRB at 326 (observing, “chaos and delay would be created if parties lost incentive to resolve by agreement the myriad of details attending an election.”), quoting *Community Care Systems*, 284 NLRB 1147 (1987). By signing the Election Agreement, each party expressly waived its right to a pre-election hearing. (JX-2, p. 11, Section 1). The parties both agreed to waive their hearing rights with the knowledge and reasonable expectation that “the language of the printed agreement constitutes the only terms under which agreed upon elections may be held.” See Section 11090 of the Casehandling Manual in Representation Cases. As the First Circuit Court of Appeals noted in *NLRB v. Granite State Minerals*, the Regional Director

received all the procedural advantages of foregoing the pre-election hearing, and therefore ceded to the Agreement her ordinary discretion to determine the election mechanics. 674 F.2d at 102.

Moreover, as the Ninth Circuit Court of Appeals held in *Summa Corp. v. NLRB*, it is not necessary for a party to demonstrate actual prejudice resulting from a breach of the Stipulated Election Agreement. 625 F.2d at 295.<sup>10</sup> Rather, the parties are entitled to insist that all other parties to the Agreement perform in accordance with the material provisions of the agreement *Id.* When a party (including the Regional Director) fails to adhere to those material provisions, then the election may be set aside, even without any actual showing of prejudice. *Id.*

Here, the plain language of the Stipulated Election Agreement did not provide the Regional Director with the authority to unilaterally reschedule the ballot receipt deadline and count. Nonetheless, the Regional Director changed the arrangements in the Stipulated Election Agreement without the consent, or even the input, of the parties. As a result, Region 7 must sustain the Employer's Objection on this basis, and order a re-run election.

**D. The Gaps in Video and Audio Access to Ballot Count Proceedings Contravene Well-Established Board Standards.**

All three witnesses who attended the full (Zoom) videoconference ballot count – Employer observer Dean Smith and Petitioner observers Dan Ruccia and Kelsea Smith – confirmed the occurrence of the two separate procedural issues identified in Employer Objections 4 and 5. (Tr. 41:8-20, 44:12-17, 45:13-46:25, 86:24-87:12, 94:13-25, 174:2-13, 179:15-180:11, 202:23-203:17, 206:15-207:3).

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<sup>10</sup> Even if a showing of prejudice were required, the insufficient postponement period discussed above would establish such prejudice.

The first issue occurred when the parties worked to review returned mail ballot envelopes, during which time Board Agent Jenkins' video<sup>11</sup> was lost for approximately seven (7) to ten (10) minutes, apparently due to her computer's battery running out of power. (Tr. 41:8-20, 45:13-46:25, 86:24-87:12, 174:2-13, 202:23-203:17). When this occurred, the parties could not see the room in which Jenkins sat with the ballots and ballot envelopes in various stages of processing. (*Id.*). Additionally, the departure of Jenkins' video feed from the videoconference meeting resulted in ***Union observer Ruccia becoming the host*** of the ballot count session. (Tr. 45:22-25, 174:21-175:2, 203:20-24).

Subsequently, during the portion of the count in which Board Agent Jenkins showed the parties the markings on each ballot and placed them into, "Yes," "No," or "Void" piles, she lost her audio connection her approximately five (5) to seven (7) minutes. (Tr. 44:12-17, 179:15-180:11, 206:15-207:3). Prior to Jenkins realizing she had lost her audio connection, she placed one ballot into a pile without the parties hearing her call, and began processing another. (*Id.*). As Union witness Ruccia admitted at hearing, it was possible that Jenkins made an error in calling or sorting the ballots before she realized the loss of audio. (Tr. 190:17-191:7).

Both the video and audio failures during the count raise ballot security and integrity concerns of the type for which the Board directs re-run elections. Indeed, the Board has made clear the parties are entitled to an "opportunity to monitor the . . . ballot count" by the Board agent. *Paprikas Fono*, 273 NLRB at 1328. The Board thus places particular emphasis on the ability of parties to observe ballot handling and processing, and has explained in analogous circumstances that it will not "speculate on whether something did or did not occur while the ballot box was left

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<sup>11</sup> Jenkins remained connected to the meeting via audio during this time because she dialed into the videoconference separately via cell phone. (Tr. 196:3-11).

wholly unattended” because it seeks to “maintain the highest standards possible to avoid any taint of the balloting process[.]” *Austill Waxed Paper Co.*, 169 NLRB 1109, 1109 (1968).

As a result, under well-established Board law, the video and audio interruptions raise ballot security and integrity concerns requiring Region 7 to direct a re-run election.

**E. Each Objectionable Process Deficiencies Here Independently Warrants a Re-Run Election, and Their Collective Impact Leaves No Doubt of the Necessity for a Re-Run Election.**

Each of the Employer’s Objections provide an independently sufficient basis for Region 7 to order a re-run election. To wit: (1) the return envelope postage issue created such confusion and concern about the integrity of the election process as to interfere with laboratory conditions; (2) the Region’s extension to the ballot receipt deadline provided insufficient time for voters to return ballots in time for the count, possibly resulting in as many as three (3) uncounted ballots; (3) the Region’s unilateral alterations to election arrangements breached the Stipulated Election Agreement; and (4) the video and audio disruptions during the ballot count resulted in unacceptable ballot security and integrity issues. Each of those issues is independently so substantial as to require a re-run election. Collectively, the facts reflect an election process so plagued by such irregularities as to fall woefully beneath the Board’s standards for fair and trustworthy elections, and to leave a re-run as the only possible means to protect employee free choice.

Against this background, yet another crucial factor weighs heavily in favor of a re-run election. As the Board has repeatedly held, objectionable issues more likely warrant a re-run election when the election margin is close. For example, the Board ordered a re-run election in *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614 (2002), and explained:

[D]espite his statement to the contrary, the hearing officer did not sufficiently take into consideration the closeness of the election results. Objections must be carefully

scrutinized in close elections. Given the vote spread, a one-vote swing [] would have brought the [] three challenges into play, potentially changing the outcome of the election.

*Id.* at 615. See also *Gonzales Packing Co.*, 304 NLRB 805, 805 (1991) (relying on closeness of election to find objectionable conduct required a re-run election).<sup>12</sup>

The Union will argue high turnout countenances against a re-run election, and somehow minimizes the seriousness of the deficiencies in the election process. The Board, however, will order a re-run election even in instances of high turnout, where objectionable issues call the propriety of the process into question. See, e.g., *Kilgore Corp.*, 203 NLRB 118, 119 (1973) (noting, “[t]he mere fact that a large percentage of voters voted is not, in our opinion, dispositive”). The Union’s argument fails to account for the impact on employee sentiment that the election’s deficiencies caused. Moreover, in such a close election, even the three (3) voters for whom a ballot was not timely received could affect the outcome.

The Board’s duty to protect employee free choice requires adherence to high standards for procedural election integrity. For multiple reasons, the election here fell far short of those standards. The question of union representation for a group of employees is both serious and critically important. Employees and employers alike deserve to have confidence that, whatever the outcome of an election, the Board measured the question of majority support in a reliable and fair manner. A re-run election thus constitutes the only available means to validate that confidence and live up to the Board’s standards here.

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<sup>12</sup> In this regard, the Employer notes it may be procedurally appropriate for the Region to: (1) first issue a Decision and Order Directing Opening and Counting of Challenged Ballots and Deferring Ruling on Objections; (2) subsequently open and count all challenged ballots of voters found eligible (and for whom challenges have been withdrawn); (3) issue a Revised Tally of Ballots; and then (4) issue a Decision and Order ruling on the Objections. Such a procedural approach would permit the Region to rule on the Objections with full knowledge of the results and margin.

**III. The Region Must Open and Count the Ballot of Michael Cornett, But Drew Sisk and Kristen Twardowski are Ineligible to Vote.**

**A. Michael Cornett Works as a Duke University Press Employee on a Daily Basis, and is Thus Eligible to Vote.**

As the party seeking to exclude an employee from the petitioned-for unit, the Petitioner bears the burden of proof on its contentions regarding Michael Cornett. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–72 (2001); *Capital Coors Co.*, 309 NLRB 322 (1992). As an initial matter, the Region must overrule the Petitioner’s challenge to Managing Editor<sup>13</sup> Cornett’s ballot because the Petitioner failed to carry its burden of proof. The only evidence it presented in support of its challenge was the pure hearsay testimony of employee Sandra Korn, who admitted:

Q. And you have never performed Mr. Cornett's job yourself, have you?

A. No. He's been in that job for longer than I've been alive.

Q. And you don't work with him on a daily basis, do you?

A. No, I do not.

Q. And all of your testimony regarding his job duties was based on your conversation with him that you described; correct?

A. Yeah. Multiple conversations with him. Yes.

(Tr. 290:22-291:8).<sup>14</sup>

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<sup>13</sup> The Employer utilizes the job titles “Managing Editor” and “Coordinating Editor” interchangeably, for administrative purposes. (Tr. 297:23-298:7).

<sup>14</sup> Notwithstanding the Union’s complete failure to carry its burden, the Employer presented Journals Director Robert Dilworth (the Director of Cornett’s Department) to testify regarding Cornett’s position. Dilworth supervised Cornett directly from 1997-2006. (Tr. 294:21-295:5). Cornett’s job duties have not changed substantially since 2006. (Tr. 295:18-296:4). In addition, Cornett’s work has remained within Dilworth’s responsibility since that time, with only one other individual between Cornett and Dilworth in the chain of command. (Tr. 294:3-295:1, 295:21-291:1, 301:20-22).

Moreover, the Union's challenge to Cornett's ballot rests upon the false premise that he is not in the bargaining unit. The parties here stipulated to a broad unit description:

All full-time and regular part-time employees employed by Duke University Press; excluding all other employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act.

Consequently, Cornett need only be "employed by Duke University Press" in order to retain voting eligibility. As Petitioner witness Korn agreed, Cornett performs journal editing work, and such work is part of Duke University Press. (Tr. 290:14-21). Journals Director Dilworth further described Cornett's primary job duties as, "overseeing the peer review process and overseeing editorial process for the journal. So specifically copy editing and proofreading and making sure the journal stays on schedule." (Tr. 296:7-11). Cornett's job description further confirms these Press journal editing responsibilities in substantial detail. (EX-9).

The sole issue the Petitioner points to in support of its challenge appears to be Cornett's responsibilities with regard to the academic Duke Center for Medieval and Renaissance Studies' ("M&R Studies"), which subsidizes Cornett's wages.<sup>15</sup> As outlined in an October 4, 2017 letter to Cornett describing the arrangement, which also makes clear his continuing status as a Duke University Press employee, Duke University Press bears 44% of his wages, while M&R Studies subsidizes 56%. (CX-9). Cornett's time spent performing duties on behalf of the two entities is approximately the same as the payroll proportions. (Tr. 301:23-302:4).

The Union's contentions regarding Cornett's M&R Studies responsibilities gain it no ground under the Board's standards for dual function employees. The Board performs a "variant of the community-of-interest test" when analyzing dual function employees, such as Cornett here.

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<sup>15</sup> Another employee in the Journals Department, Claude Misukiewicz, also has a split arrangement with an academic department (Economics). (Tr. 304:21-305:3). Misukiewicz's job duties are similar to Cornett's. (Tr. 305:4-11). Misukiewicz voted in the election, but the Petitioner did not challenge his ballot. (Tr. 316:23-317:7).



*Halsted Communications*, 347 NLRB 225, 226 (2006). This analysis considers “whether the employee is regularly employed for sufficient periods of time to demonstrate that [they have] a substantial interest in the unit’s wages, hours, and conditions of employment.” *Berea Publishing Co.*, 140 NLRB 516, 518–19 (1963). Once a party meets this standard, it is “both unnecessary and inappropriate to evaluate other aspects of the dual-function employee’s terms and conditions of employment in a kind of second tier community-of-interest analysis.” *Oxford Chemicals, Inc.*, 286 NLRB 187, 188 (1987).

Applying this analysis, the Region must include Cornett in the petitioned-for unit. As explained above, the evidence (including the hearsay testimony of Union witness Korn) makes clear Cornett performs journal editing work on a daily basis, as a core component of his overall job duties. (EX-9) (Tr. 279:19-280:7, 290:14-21, 296:7-11, 301:23-302:4). Moreover, Board law demonstrates Cornett’s performance of duties on behalf of Duke University Press for 44% of his time more than suffices to establish him as a dual function employee appropriate for inclusion in the unit.

For example, in *Medlar Electric, Inc.*, 337 NLRB 796 (2002), the Acting Regional Director excluded a dual-function heavy equipment operator from a petitioned-for unit of truck drivers because he only performed truck driving duties 25%-30% of the time. The Board overturned that decision, finding that since the heavy equipment operator performed unit 25%-30% of the time, “he regularly performs unit work for a sufficient period of time to demonstrate that he has a substantial interest in the unit’s wages, hours, and conditions of employment.” *Id.* at 797. The same analysis applies here. Even assuming the Petitioner’s characterization of all the facts, Cornett regularly works within Duke University Press. His job description leaves this point beyond dispute. (EX-9).

Furthermore, Cornett is fully integrated within Duke University Press operations. He attends monthly full-staff Departmental meetings, and the annual meeting for the entire Press. (Tr. 302:25-303:9).<sup>16</sup> His job duties involve regular interaction with other Duke University Press employees. (Tr. 302:3-24). Such work is functionally integrated within the work of the Press overall, in part because the journal he edits holds particular intellectual and financial importance within the Press. (Tr. 303:10). Press Senior Managing Editor Stacy Lavin sets Cornett's work goals and evaluates his performance. (Tr. 303:21-25). Accordingly, both management and other employees view Cornett as part of Duke University Press. (Tr. 304:1-18).

Consequently, Cornett qualifies as a Duke University Press employee, and an eligible voter. The Region must therefore overrule the Petitioner's challenge to his ballot.

**B. At the Time of the Election, Drew Sisk Worked as a Temporary Employee, and was Therefore Ineligible to Vote.**

Book Designer Christopher ("Drew") Sisk was nearing the conclusion of a clearly defined temporary arrangement at the time of the election, and was thus ineligible to vote under Board standards. No substantial factual dispute exists with regard to Sisk's temporary work circumstances.

On May 26, 2020, Sisk informed the Employer of his resignation from a permanent and full-time book designer position, and also requested permission to work in a part-time temporary position for the remainder of 2020. (EX-13). The Employer granted and accommodated his request, setting a defined end date for his temporary position as the end of 2020. (EX-14). In November 2020, Sisk requested to extend his temporary arrangement until June 30, 2021, and the

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<sup>16</sup> At the most recent annual meeting, Cornett received an award for 25 years of service with Duke University Press, and spoke about his work in the Press. (Tr. 303:7-9).

Employer again agreed. (EX-15) (PX-11). Sisk's employment did, in fact, conclude on June 30, 2021. (EX-16) (PX-12) (Tr. 226:18-20).

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individual is indefinite or uncertain, the Board permits the individual to vote. *Personal Products Corp.*, 114 NLRB 959, 960 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433, 1438 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991); *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 32 (1st Cir. 1978). Conversely, where employees are employed for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, such employees are excluded as temporary. *Indiana Bottled Gas Co.*, 128 NLRB 1441, 1442 fn. 4 (1960); *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323, 1325 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); *E. F. Drew & Co.*, 133 NLRB 155, 156–157 (1961).

Here, the documentary evidence makes abundantly clear that the Employer treated Sisk's position as temporary since May 2020, with a specified end date established at all times. (EX-14, 15) (PX-11). Moreover, Human Resources Director Bonnie Conner confirmed the Employer treated Sisk as a temporary employee for human resources purposes at all times since May 2020. (Tr. 249:16-19, 250:17-20). Sisk himself appeared to acknowledge the temporary nature of the arrangement in his farewell message to his Press colleagues, stating, "I've been lucky to keep one foot in at DUP, delaying my exit and continuing part-time through today." (EX-16). These facts leave no doubt under Board standards that the Employer properly excluded Sisk from the Voter List due to his temporary status.

The Petitioner argues that some vague statements by Design Manager Amy Buchanan may have introduced a degree of uncertainty regarding Sisk's precise end date. The record makes clear,

however, that Buchanan did not possess the authority to extend Sisk's temporary arrangement, and instead only Director Dean Smith and the Human Resources Department possessed that authority. (EX-14, 15) (PX-11) (Tr. 319:17-20). Specifically, in June 2021, Buchanan explored the possibility of Sisk's arrangement extending past June 30, 2021. (Tr. 265:15-21, 318:14-24, 319:17-320:1). No such extension occurred, however, because Sisk's replacement had already been hired with a start date of July 1, 2021, and Sisk's exiting process had already commenced. (*Id.*). Moreover, *even if* Buchanan had successfully obtained a second extension to Sisk's temporary arrangement, such an extension would not have changed the fact that his status remained temporary, with a specific end date. As explained above, such an established end to a temporary arrangement results in ineligibility to vote under Board law.

As a result, the undisputed facts demonstrate Sisk worked as a temporary employee at the time of the election. The Region must therefore sustain the Board challenge and set aside Sisk's ballot.

**C. At the Time of the Election, Kristen Twardowski had Tendered Her Resignation, and as a Result became Ineligible to Vote.**

No factual dispute exists regarding the timing and circumstances of Library Sales Manager Kristen Twardowski's resignation from employment. Twardowski submitted her letter of resignation on June 24, 2021, left to assume a new position at another university press, and last worked at Duke University Press on July 30, 2021. (EX-10) (PX-1) (Tr. 256:24-257:2, 257:13-258:8, 259:13-15).

The Board has long held that employees who voluntarily quit a voting unit lose their eligibility to vote. *Dakota Fire Protection Inc.*, 337 NLRB 92 (2001). The parties reaffirmed this standard in their Stipulated Election Agreement here, where they agreed under Paragraph 5,

“Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility . . .”

By submitting her resignation prior to the election, Twardowski eliminated any substantial expectancy of continued employment after the election. *Indiana Bottled Gas Co.*, 128 NLRB at 1442 fn. 4; *Owens-Corning Fiberglass Corp.*, 140 NLRB at 1325; *Sealite, Inc.*, 125 NLRB 619 (1959); *E. F. Drew & Co.*, 133 NLRB at 156–157. Furthermore, under the language of the Stipulated Election Agreement, Twardowski fell into the literal, plain, and ordinary definition of employees who had “quit,” whom the parties agreed to exclude.<sup>17</sup> In other words, the act of quitting was the Twardowski’s pre-election resignation letter, even if the full consequence of that act was not fulfilled until sometime later.

As a result, the Region must uphold the Employer’s challenge to Twardowski’s ballot on the basis of her voluntary resignation.

#### **IV. Conclusion**

Based on the foregoing, Region 7 must dispose of challenges by counting the ballot of Michael Cornett, and excluding as ineligible the ballots of Drew Sisk and Kristen Twardowski. Additionally, to protect the integrity of the Board’s election process standards and employee free choice, Region 7 must sustain the Employer’s Objections and direct a re-run election.

Dated: August 30, 2021

Respectfully submitted,

**OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.**

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<sup>17</sup> Specifically, Merriam-Webster's dictionary defines the meaning of “quit” in this context as to “give up,” which is precisely the written message communicated by Twardowski prior to the election. Merriam—Webster, <https://www.merriam-webster.com/dictionary/quit> (last visited, August 26, 2021).

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Duke University**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

<b>Duke University,</b>	)	
	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	<b>Case No. 10-RC-276475</b>
	)	
<b>Washington-Baltimore News Guild, Local</b>	)	
<b>32035</b>	)	
	)	
	)	
<b>Petitioner.</b>	)	

**CERTIFICATE OF SERVICE**

I certify that on August 30, 2021, a copy of the foregoing Post-Hearing Brief on Objections and Challenges was Electronically Filed on the NLRB's website at <http://www.nlr.gov>, and was also served on the following by email: Robert E. Paul, counsel for the Petitioner: [rpaul@robertepaul.com](mailto:rpaul@robertepaul.com) .

Harrison C. Kuntz  
Harrison C. Kuntz

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 7**

**DUKE UNIVERSITY,**

**Employer,**

**and**

**WASHINGTON-BALTIMORE NEWS  
GUILD, LOCAL 32035,**

**Petitioner.**

**Case No. 10-RC-276475**

**WASHINGTON-BALTIMORE NEWS GUILD'S  
POST-HEARING BRIEF TO THE HEARING OFFICER**

On May 3, 2021, the Washington-Baltimore News Guild, Local 32035 (hereinafter "Petitioner" or "Guild") filed a representation petition with Region 10 seeking to be certified as the collective bargaining representative of a unit of employees of the Duke University Press. Thereafter, the parties entered into a Stipulated Election Agreement for a mixed manual/mail ballot election. On June 29, 2021, the Region conducted a count of the ballots and issued a tally certifying that a majority of employees had designated the Guild as their bargaining agent although there were eight (8) challenged ballots which would determine the final results of the election. Thereafter, Duke University (hereinafter "Employer" or "Press") filed objections to conduct affecting the results of the election. A hearing was held on the challenges and objections on August 10 and 19, 2021 before Hearing Officer Matthew Ritzman of Region 7.<sup>1</sup>

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<sup>1</sup> By Order dated July 21, 2021, the case was transferred to Region 7. Board Exh. 1(b).



Pursuant to Section 102.69(c)(iii), of the NLRB Rules and Regulations, the Petitioner hereby files this post-hearing brief with the Hearing Officer.

## STATEMENT OF THE FACTS

### A. The Election Objections

As noted, on May 3, 2021, the Guild filed the instant petition seeking to be certified as the representative of all full- and part-time employees of Duke University Press. JX 1. By May 13, 2021, the parties had agreed to a stipulated unit and Stipulated Election Agreement which, *inter alia*, set June 2, 2021, as the date for a manual election; established June 2, 2021, as the date for mail ballots to be sent to voters; scheduled the count for June 22, 2021. JX 2.

As reflected by the June 11, 2021 Order issued by Lisa Henderson, Acting Regional Director of Region 10, it soon appeared that it was "unclear whether pre-paid deliver postage was included on the original return yellow envelopes" that would contain envelopes within which would be the marked ballots.<sup>2</sup> Field Examiner Ingrid Jenkins, who was handling the mechanics of the election, reported that by about June 10, 2021, no ballots had yet been returned to the Winston-Salem subregional office. By that date, several employees had been in contact with Field Examiner Jenkins, as had counsel for both parties,<sup>3</sup> about the fact that the pre-

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<sup>2</sup> Before that, several employees had communicated with Field Examiner Jenkins about the matter. See Er. Exhs. 2, 17. Additionally, several admittedly anti-Guild employees circulated a message that employees should contact Jenkins. Er. Exh 4; Tr. 127. Testimony from employee Kelly Andrus about employee concerns and assertions that the region was "negligent" was admitted over the Guild's objection. Tr. 115, 119-121.

<sup>3</sup> Dean Smith, Director of Duke University Press, acknowledge that the Employer's counsel "always tells us he is in contact with the regional office and this is what's going to happen." Tr. 58. Counsel told Smith that he had, in fact, spoken directly to Jenkins about the issue and the issuance of new ballot kits. Tr. 58-59. Smith admitted that the Employer's counsel had two to three conversations with Board Agent Jenkins about the mail ballot issue [continued next page]

addressed return envelopes somehow did not appear to contain USPS postage. The Board agent properly explained to those who reached out to her that everyone would receive a new ballot and that the deadline for returning the ballots would likely be extended. Er. Ex. 3.<sup>4</sup>

The next day, June 11, 2021, Acting Regional Director Henderson issued an "Order Rescheduling Ballot Count." The Order states, in relevant part:

It is unclear whether pre-paid deliver postage was included on the original return yellow envelopes. As result and in order to correct this administrative oversight, the Region will be issuing duplicate mail ballot election kits to all employees on the mail ballot voter list. All employees who want to vote in the election should return their mail ballot received from the duplicative mail ballot election kit that are being mailed out today, June 11, 2021. If you want to make sure that your vote will be counted in the election, you should send in the mail ballot you will be receiving from the mail ballot election kit mailed today, whether you sent in a mail ballot before or not. Please carefully follow the instructions included with your mail ballot election kit and please call the telephone numbers provided on the form should you have any questions.<sup>5</sup>

Additionally, and in order to afford time for the ballots to be received by the Regional Office, the Acting Regional Director rescheduled the count for June 29, 2021. "In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots on June 29, 2021." JX 4. Thereafter, a copy of the Order was distributed by the Employer to every employee and also included within the mail ballot election kits that went out

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and process. Tr. 61. Counsel reported these conversations to Smith, including his discussion with Jenkins about the fact that ballots would be reissued and that there would be an extension of the date to return ballots. Tr. 64. Whether the Employer literally "agreed" with the action of the Acting Regional Director or not, Tr. 38, Smith admitted that at no time did the Employer register an objection to the decision to issue new ballots or to extend the date by which employees were to return their ballots. Tr. 65.

<sup>4</sup> As noted, the Board Agent discussed these steps with the Employer's counsel as well. Tr. 56-57, 58-59.

<sup>5</sup> Employee La Tasha Cowden wrote Jenkins to make sure that "duplicate" ballots were not counted. Er. Ex. 6. As set forth below, no duplicate ballots were counted.

on June 11, 2021.<sup>6</sup> The Employer's Human Resources Director, Bonnie Conner, and with the advance approval of Director Smith and the Employer's counsel, Tr. 56, 61, also issued an all-staff email on June 10, 2021 to notify them of the development, and to convey the steps to be taken by the NLRB to "correct" the situation. JX 5; Er. Exh. 3, p. 2. Conner invited any employee to contact Jenkins directly about the matter. Notably, neither party raised an objection to this procedure or to the Order. Tr. 65.<sup>7</sup>

The count was held on June 29, 2021, via Zoom, as ordered by the Acting Regional Director. Field Examiner Jenkins conducted the count from a conference room in the Winston-Salem subregional office with the parties and observers attending via Zoom. As described in detail by Ruccia and Kelsea Smith, an assistant managing editor at the time, Jenkins convened a pre-count conference at 12:30pm, although it did not start until 15 minutes later when the Employer's representatives arrived.<sup>8</sup> Jenkins had set up her laptop for video and was using her phone for audio; she explained that there were "some internet issues that made it problematic to run audio through her computer." Tr. 161.<sup>9</sup> Jenkins panned the room with her computer so everyone could confirm no one else was in the room, and that the only materials were a pile of

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<sup>6</sup> Initially, as explained by Dan Ruccia, a marketing designer with the Press for about 8 years, there were employees who were a little confused and disappointed by the issue with the mailed ballots, but once the Region issued the Order employees simply followed the procedure. Tr. 159. Ruccia had several conversations with Jenkins about the matter, as did other employees and counsel. Tr. 159.

<sup>7</sup> Lisa Savage, one of the employees who had been in contact with the Field Examiner about the matter later confirmed with the Field Examiner that both of her ballots, the original and the duplicate ballot, had been received by the Region in time for the count. Er. Exh. 18.

<sup>8</sup> Dean Smith could not even recall when the conference began, stating "[n]oon, midday, something like that, 11 am." Tr. 66.

<sup>9</sup> Dean Smith did not recall her explanation. Tr. 70.

envelopes and a sealed box containing the ballots from the June 2 manual election. Tr. 161-62, 195.<sup>10</sup> Jenkins walked through how the count would occur and after answering questions took a break before the actual ballot count got underway. During the break, the computer camera remained focused on the ballots. Tr. 163-64.

The count session began at 1pm.<sup>11</sup> As Ruccia explained, the first order of business was to review the mail-in ballots to ascertain if there were duplicates from the same employee; determine, if so, which was the first ballot received, and to hear any challenges lodged by the parties. Tr. 164-65.<sup>12</sup> Field Examiner Jenkins had organized the ballots in alphabetical order according to the employee list, and any duplicate ballot envelopes from an employee were grouped together. Tr. 165-66.<sup>13</sup> Jenkins then displayed on the screen each envelope so that the party representatives could examine the envelopes and confirm which ballot had been returned to the regional office first. The earlier of the two ballots was placed in the pile; the later-received ballot envelope was set to the side. *Id.* Tr. 84. As attested to by both Ruccia and Kelsea Smith, approximately 80% of the mailed in ballots were duplicates – thus establishing that both the original ballot envelope and the duplicate ballot mailed out on June 11, 2021 had ultimately been

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<sup>10</sup> Dean Smith agreed that no one was in the physical room other than Jenkins during the pre-count meeting or the count itself. Tr. 69, 71.

<sup>11</sup> Dean Smith and the Employer's counsel both attended and observed the entire count. Tr. 99-100, 102-03.

<sup>12</sup> Dean Smith was unable to recall these steps undertaken by the Board Agent. Tr. 81.

<sup>13</sup> A photo of one of the ballot kits, addressed to employee Kelly Andrus, was introduced as Er. Exh. 5.

received in the Regional Office from an "overwhelming majority" of the voters.<sup>14</sup> Tr. 163, 166.<sup>15</sup> After Field Examiner Jenkins had reviewed all of the ballots in the room, she announced she was going to check with the Regional Office to determine whether any additional ballots had arrived that day.<sup>16</sup> Tr. 167, 199-200. Jenkins left the audio intact as well as the computer camera focused on the ballots,<sup>17</sup> departed the room for a couple of minutes, and returned with two envelopes. Tr. 78, 167-68; 200. No one objected to Jenkins' effort to verify whether additional ballots had been received or to the inclusion of these two ballots in the count. Tr. 79, 169, 200.

At that juncture, Jenkins turned to the sealed box containing ballots from the June 2, 2021, manual election. When she opened the box, there were three blue envelopes from the warehouse employees and a dozen or so from non-warehouse employees that had been challenged by the Board agent at the time.<sup>18</sup> Tr. 169. At one point the Guild voiced an arguably

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<sup>14</sup> La Tasha Cowden, one of the employees called by the Press to testify about the election issue, was concerned about a duplication of ballots, Tr. 144-45, 150, but admitted that her concern would be satisfied if, as it actually turned out, most of the original ballots were, in fact, ultimately received by the Regional Office. Tr. 150-51. She said the issue was a "hot topic" for the "several" employees with whom she discussed the matter. Tr. 152. Cowden voted manually, on June 2, 2021, prior to any issue arising with the mail ballots. Tr. 154. Perhaps given the well-publicized issues with the United States Postal Service's delay in the distribution of mail, Cowden did so just to "make sure my vote was received." *Id.*

<sup>15</sup> Kelsea Smith clearly recalled that there were two mailed in ballots from a "vast majority" of the employees who voted by mail. Tr. 197. Dean Smith could not offer a percentage, but readily agreed that "most" of the envelopes represented two ballots from the same employee." Tr. 74.

<sup>16</sup> This effort was consistent with the Order of the Acting Regional Director, and standard mail ballot procedure, that all ballots received by the time of the actual count would be considered. JX 4.

<sup>17</sup> Contrary to Dean Smith, the parties could see the ballots when Jenkins left the physical conference room. Tr. 41, 44.

<sup>18</sup> As the manual election of June 2, 2021, was intended only for the three warehouse employees, the Field Examiner initially challenged ballots from other employees. At the time, she indicated that the challenges would be rescinded if the employees did not otherwise vote. Tr. 169.



late challenge to the ballot of Kelly Andrus, and Jenkins briefly left the room – leaving the ballots on camera in full sight of the parties – to confer with the Regional Director. Tr. 170-71.

When Jenkins returned, it was approximately 2:00pm, and she, as host of the Zoom meeting, began to admit observers into the virtual room. Tr. 171-72.<sup>19</sup> She first took the pile of mailed-in ballots that were to be counted and announced that she would be removing the inner envelopes from the outer envelopes. She took a letter opener to cut open the yellow outer envelope, removed the inner envelop (containing the ballot), and placed the inner envelopes on the table. Tr. 173. At some point while this was in progress, the Board Agent announced that her laptop battery was running low on power and, within moments, the video of the count ceased when her laptop ran out of power.<sup>20</sup> Tr. 174, 202-03. This brief loss of video had no effect on the audio which continued uninterrupted. Tr. 174.

As the Field Examiner was seeking to remedy power to computer, Ruccia suddenly became the "host" of the Zoom session.<sup>21</sup> Tr. 175. During the about five minutes until Jenkins

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<sup>19</sup> Ultimately, about 25-30 observers entered the room. Tr. 172.

<sup>20</sup> The impact was that Jenkins' image was no longer on the screen, although the "thumbnail[]" images of the observers were not affected. Tr. 87.

<sup>21</sup> Despite Dean Smith's bald assertion that "Dan [Ruccia] stepped in to become the host of the meeting," Tr. 87, the record firmly establishes that no one, including Ruccia, took any steps whatsoever for that to occur. Tr. 203-04. Instead, as Ruccia theorized at the hearing, the algorithms built into Zoom may have made him the host automatically as he had been the person at the meeting for the longest period of time. Tr. 175. The record understandably does not contain a scintilla of evidence and, in particular, not even a hint, that anyone from the NLRB or the Guild made Ruccia the temporary host. Tr. 204. Dean Smith ultimately admitted that, despite his contention, he has no information that Ruccia took any steps to become temporary host. Tr. 89.

was restored as host,<sup>22</sup> not a single ballot was opened or counted, and there was no difficulty in communicating with Jenkins on audio. Tr. 175-76, 204-05. Additionally, and other than the camera angle being different – presumably because Jenkins had relocated her computer to be closer to an electric outlet – there was no change at all in the location of the ballots or the envelopes when Jenkins' video was restored. Tr. 176-77.

Once Jenkins reacquired her role as the host of the meeting, she returned to the task of opening the outer envelopes – first of the mailed-in ballots and then of the ballots from the manual election. Tr. 177. Jenkins placed all of the blue envelopes (containing the actual ballots) in the box, co-mingled them and then began to extract the actual ballots from the inner envelopes. Tr. 178. Jenkins ultimately emptied the box, showed the audience that the box was empty, and collapsed it. Tr. 178.

Jenkins then set up table tents on the table of "Yes," "No," and "Void," and took the ballots, displayed each ballot to the observers, and then placed the ballot, depending on the marking, in the appropriate pile of "Yes," "No," or "Void."<sup>23</sup> Tr. 76-77. Around 2:50pm, about 15 minutes into this process, the audio of her phone went out. Tr. 179. The video was not affected. Tr. 180. Jenkins understandably did not immediately realize that the audio had stopped. "So she showed one ballot [to the camera] and was presumably reading off what it was and put it in the pile and was going on to the next one and someone unmuted and said we couldn't hear her." Tr. 180. Kelsea Smith recalled the moment:

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<sup>22</sup> The Employer, sponsor of the Objections, thought Ruccia served as host only for a minute or two. Tr. 89.

<sup>23</sup> It is clear that Dean Smith's recollection that she did not show the warehouse ballots to the audience is incorrect. Tr. 77.

At some point while she had held up a ballot, she opened a ballot and/or pulled up a ballot and we didn't hear her read anything. We didn't hear her voice announce what is like we had been when we saw her hold it up to the camera and we saw it was a "yes" vote, she put it in "yes" pile and she pulled out another ballot. And I think that's when someone said, "Ingrid, we can't hear you." So she paused and kept the ballot in her hand, and we saw her shuffling around with the computer to get audio back.

Tr. 206-07. Ruccia described what happened next.

She, you know, immediately I think came over to her computer and did what she needed to do to restore audio. It couldn't have been more than like a minute or two, it was [a] very quick process.

Tr. 180. During that interval, Jenkins did not continue to open or count any ballots.<sup>24</sup> Once her audio was restored, Jenkins completed the count,<sup>25</sup> confirmed that the tally of ballots comported with the tallies that were being taken by the observers, and announced the result of the election.

Tr. 181. Ultimately, approximately 97% of the eligible voters cast ballots in the election. Tr. 97-98.<sup>26</sup>

At no time during the session did anyone from the Employer object to the process or what had transpired. Tr. 182.<sup>27</sup>

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<sup>24</sup> Contrary to the recollection of Dean Smith, the Employer's representative at the count and Director of Duke University Press, no ballots were actually counted during this brief moment without audio. Tr. 49.

<sup>25</sup> Without objection from either party, Jenkins properly included in the count the two ballots that were being reviewed when her audio briefly went out. Tr. 95.

<sup>26</sup> While Savage said she "did not have faith in the NLRB" due to the issue with the ballots, both her original ballot and her duplicate ballot were timely received by the Region, and her ballot was counted. Tr. 230, 233, 276.

<sup>27</sup> The Employer claims that the "errors" at the count "cast doubt on the validity of the election for our employees." Tr. 48. Other than what he learned from counsel, Dean Smith's source of information was from two employees. Tr. 54. Andrus, who openly sought to support this notion as an admittedly anti-union employee, conceded that she had only spoken with four or five employees – out of 78 potential voters – about the election. Tr. 124. [continued next page]



## B. The Challenged Ballots<sup>28</sup>

The challenges that remain in dispute are the Employer's challenges to the ballot Kristen Twardowski and Drew Sisk, and the Guild's challenge to the ballot of Michael Cornett.

### 1. Kristen Twardowski

Kristen Twardowski commenced her employment with the Press on July 13, 2015, and eventually became a library sales manager. Tr. 256-57. By late June 2021, Twardowski had obtained a position with another employer, and to provide as much advance notice of her departure as possible, transmitted a resignation email to her supervisor on June 24, 2021. Pet. Exh. 1; Er. Exh.10; Tr. 257. Twardowski worked as a full-time Press employee both on the day of the June 29, 2021, election as well as through July 30, 2021. Tr. 245, 253, 257, 259.

On June 28, 2021, Twardowski was notified of her new rate of pay effective July 1, 2021, as well as her entitlement to a \$1,000 annual bonus. Pet. Exh. 2. She received the bonus, and her pay was increased as of July 1, 2021, and continued at that rate through the end of her employment. Tr. 258-59.

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And while Andrus initially sent Field Examiner Jenkins a message on May 29, even before the election began, she never followed up. Er. Exh. 2; Tr. 127, 139.

Moreover, at the hearing the Employer hinted at a claim that Board Agent Jenkins was biased in favor of the Guild because she replied to pro-Guild employee Roy Pattishall but not to anti-Union employees Andrus or Cowden. Tr. 114-15, 146. The notion is both reprehensible and without factual support at all. The record shows that Jenkins conversed with the Employer's counsel on a number of occasions, and responded to emails from other employees, including Andrus. Er. Exhs. 17-18.

<sup>28</sup> The Employer has withdrawn its challenge to the ballot of Hannah Lee Willoughby-Harris, and the Guild has withdrawn challenges to Lisa Savage, Lynn Farges, Christine Critelli and Kelly Andrus. As a result, those ballots may be opened and counted.

## 2. Christopher "Drew" Sisk

Drew Sisk began his employment with the Press on January 15, 2019, as a book designer and on a full-time basis. By July 2020, Sisk had relocated to Tennessee to take a teaching position at Tennessee Tech University. As a result, Sisk proposed to his supervisor, Amy Buchanan, that he convert to part-time status through the end of 2020. Er. Exh 13; Tr. 263. The Press agreed, and Sisk reduced his 40 hour per week work schedule to a regular 10 hour per week schedule. Tr. 263.

A few months later, as Sisk was approaching the end of the calendar year, he and Buchanan revisited his status and the Press agreed he would continue his part-time job at least through June 30, 2021. In a November 12, 2021, email to Sisk, Buchanan announced that his situation had been approved to continue through the end of the fiscal year, June 30, but expressly left the door open to a further continuation. Buchanan put it simply: "And if this hiring freeze drags on, as I expect it will, maybe longer, if you remain interested." Pet. Exh. 11; Tr. 264.<sup>29</sup> Sisk understood the message: "And then at that point in November when it was like hey, you know, we can extend you to June 30<sup>th</sup>, and possibly further, you know. I knew that I could balance it, so it seemed to me that the door was open with the understanding that officially it was approved through June 30<sup>th</sup>, but with that door open, yeah." Tr. 274.

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<sup>29</sup> At the hearing, HR manager Bonnie Conner sponsored several email exchanges generated in this time frame to describe the agreement regarding Sisk's work schedule. Er. Exh. 14, 15; Tr. 248-50. In her testimony, she labeled Sisk a "temporary" employee, but she admitted that there was no reference whatsoever to any "temporary" status in any of the email correspondence. Tr. 248, 253-54. Indeed, Sisk confirmed that no one had ever referred to his position as "temporary." Tr. 267. The Press' formal "Employee Data Sheet," admitted into the record as Petitioner's Exh. 13, also makes no reference to any "temporary" status. Indeed, it lists a "planned wks/yr" of 52."

When June 2021 rolled around, Buchanan inquired as to whether Sisk would be interested in continuing his employment past June 30, 2021. He responded that he was "open to it." Tr. 265. But by about mid-June, Buchanan informed him that the Press was not willing to continue his employment after June 30, 2021.<sup>30</sup> As a result, Buchan solicited Sisk to write a resignation letter, and he did so in June on June 28, 2021. Pet. Ex. 12; Tr. 266, 276. Sisk penned a "goodbye" note to his colleagues on June 30, 2021, his last day as a Press employee. Er. Exh. 16.

Thus, Sisk was a regular part-time employee on June 29, 2021, the date of the election, and, as noted, left the Press after his June 30, 2021, workday. Tr. 266.

### 3. Michael Cornett

By all accounts, Michael Cornett's position with the Press is "unique." Tr. 280, 312. While he holds a position of managing editor of the Journal of Medieval and Early Modern Studies, Tr. 294, his main role as an employee of the university is as Associate Director of the Center for Medieval and Renaissance Studies and as director of undergraduate studies. Tr. 279-80. Indeed, both 56% of his pay, and 56% of his work time, is devoted to his roles outside of the Press.<sup>31</sup> Tr. 279, 286-87, 302, 306-07.<sup>32</sup> His job description for his role at the Press similarly

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<sup>30</sup> Conner confirmed that Buchanan had inquired about Sisk remaining on board after June 30, 2021. Conner testified that by that point the Employer had hired his replacement and, thus, they could not retain Sisk. Tr. 319.

<sup>31</sup> Cornett's merit increase is based on his work for the Press and his work for the college. Er. Exh 9; Tr. 298-99. Indeed, a memo issued several years ago to address the timing of any merit increases was copied to individuals outside of the Press. Tr. 310.

<sup>32</sup> Over the years, Cornett has spent less time on Press activities and more on his position with the University. The split used to be 50-50. Tr. 307.

reflects that only 44%, a minority of his work time, will be spent on Press issues. Er. Exh 8; Tr. 308.<sup>33</sup>

Thus, Cornett is responsible to duties and functions unknown to anyone else at the Press.

For example:

- Cornett attends faculty meetings, unlike any other Press employee; Tr. 286
- Cornett is a member of the graduate faculty of the University, unlike anyone else at the Press; Tr. 286
- Cornett participated in management strategy sessions when the faculty was involved in a union organizing efforts, Tr. 282
- Cornett supervises graduate student dissertations, Tr. 282
- Cornett serves on the Dean of the University's humanities team, Tr. 282

In short, as attested to by Korn, Cornett's role is responsible for "administrative functions that no other members of our bargaining unit serve anything similar to." Tr. 282. Indeed, Cornett's day-to-day governance of his work and time is handled through the Center, not the Press. Tr. 285.

And Cornett is separately evaluated by the University, and has an offer in Trent Hall, unlike any other Press employee. Tr. 308-11.<sup>34</sup>

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<sup>33</sup> Both parties presented hearsay evidence regarding Cornett's position. Sandra Korn, a Press employee for six and one-half years, related specific information about Cornett's jobs based on numerous and recent discussions with him. Robert Dilworth, who is journals director, addressed information about Cornett's role with the Press, and only generally about his work else for the college.

<sup>34</sup> The Employer took a stab at addressing Cornett's benefits, but key benefits, such as health insurance and tuition assistance, are the same for all employees of the University, both those in the Press and on campus. Tr. 314.

For these reasons, Cornett acknowledged that he does not share a "community of interest" with the employees in the Guild bargaining unit. Tr. 282, 283.<sup>35</sup>

## ARGUMENT

### 1. The Acting Regional Director Had Broad Authority To Issue New Ballots and to Delay the Count

Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstances. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

*Polymers, Inc.*, 174 NLRB 282 (1969) (n omitted), *enfd.* 414 F.2d 999 (2<sup>nd</sup> Cir. 1969), *cert. denied* 396 U.S. 1010 (1970).<sup>36</sup> Stated differently, the litmus test always is whether any misconduct "so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004).

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<sup>35</sup> The Press sought to downplay this admission by asserting that Cornett is not the only Press employee who has a "split" arrangement with another section of the University, noting the fact that employee Claude Misukiewicz, who voted in the election, also receives some pay outside of the Press. Tr. 289-90. Yet the record shows that a vast 85% of his pay comes from the Press, unlike Cornett who only receives 44% of his pay from the Press. Tr. 290, 304. Indeed, as Dilworth conceded, "no one else" at the Press has a split where a majority of their time and income comes from elsewhere within the University. Tr. 312.

<sup>36</sup> There, the company challenged the manner in which the election box was sealed and the fact that the agent did not retain physical custody of the box at all times. The Board observed that these cases are fact-specific and dismissed these concerns as there was "only the most remote possibility that anything untoward occurred." In short, the Board found there was "no reasonable possibility of irregularity inhered in the conduct of the election." *Id.* at 283.

Indeed, "[t]he Board 'requires more than mere speculative harm to overturn an election.' *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995).<sup>37</sup>

With regard to election agreements, it is well-established that a regional director has some discretion in connection with election agreements as these agreements are considered contracts between the parties. *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968). Indeed, the NLRB Casehandling Manual confirms that "exceptional circumstances" may warrant deviation from the Stipulated Election Agreement. *See* Section 11090, NLRB Casehandling Manual, Part Two. If there is an alleged violation of the terms of the election agreement, the issue always is whether "the breach is 'material or prejudicial'...." Indeed, "unusual circumstances [may make] the agreement impossible to perform." *T&L Leasing*, 318 NLRB 324, 326 (1995). The Board has noted that "conducting an election during the COVID-19 pandemic raises unprecedented challenges." *Balfour Beatty Communities, LLC*, 2020 WL 2768914 (2020).

Finally, it is axiomatic that "[t]t is the Employer's burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election." *Consumers Energy Co.*, 337 NLRB 752 (2002).

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<sup>37</sup> For example, in *Sawyer Lumber, LLC*, 326 NLRB 1331 (1998), the allegation was that the election should be set aside because the observers and Board agent took breaks and left the polling area, thus leaving the open ballot box unsecured. The Board held that this mere speculation of irregularity did not warrant that the election be set aside. In the instant case, each occasion that Field Examiner Jenkins left the physical conference room she left the video on the ballots, and when the audio or video went out the other method of communication remained intact. As in *Sawyer Lumber*, the Employer's objection here is not supported by any *facts* of actual harm to the integrity of the election.



## II. Voter Eligibility

The cases are legion that to be eligible to vote in an NLRB election an employee must be in the unit on the eligibility date and working in employee status on the election date. *Nichols House Nursing Home*, 332 NLRB 1428, 1429 (2000); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973); *Plymouth Towing Co.*, 178 NLRB 651 (1969). Changes in employee status that transpire *after* the election date are immaterial.

The Board has frequently held that:

the eligibility of voters in Board elections is to be determined on the basis of employment status of each voter during the eligibility period and at the time of the election. *Accordingly, any change in employment status subsequent to the election is immaterial with regard to eligibility in an election.*

*North General Hospital*, 314 NLRB 14, 15 (1994) (emphasis in original). Thus, an employee who is set to become a supervisor after the election is still eligible because they were eligible on the date of the election. *Nichols House Nursing Home*, 332 NLRB 1428 (2000); *Grange Debris Box & Wrecking Co.*, 344 NLRB 1004 (2005) (employee was eligible who had given notice but was employed on the election date). Similarly, an individual who is an eligible employee on the date of the election is entitled to have their ballot counted even if that employee intends to quit after the election. *Magic Beans, LLC*, 352 NLRB 872 (2008)<sup>38</sup>; *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1444 (9<sup>th</sup> Cir. 1093).<sup>39</sup>

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<sup>38</sup> There, the Board cited *Personal Products Corp.*, 114 NLRB 959, 961 (1955), for the proposition that an employee who gave notice to the employer that she would quit two days after the election was eligible to vote.

<sup>39</sup> Cf. *Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001) (employee not eligible who terminated employment and stopped working before the election).

#### A. The Employer's Objections Do Not Warrant a New Election

As set forth at the Hearing, Bd. Exh 1(a), the Employer asks the Region to invalidate the June 29, 2021, election. The Objections are properly grouped into two categories – (1) claims that relate to the actions of the Acting Regional Director when she issued another round of mail ballots to eligible voters and ordered an extension of the election date to June 29, 2021, and (2) assertions relating to actions by the Board agent during the June 29, 2021, count. Neither of these allegations, we submit, justify the Employer's extraordinary request under these circumstances to invalidate the properly held election.

Let's look at the record. As a result of the Stipulated Election Agreement, the election commenced on June 2, 2021, when the three employees who worked in the warehouse were entitled to vote and when ballots were mailed out to all of the other employees in the unit. By June 10, 2021, the Region became concerned that it had not yet received any marked ballots in the mail, and had received information that suggested that insufficient, or no, postage had inadvertently been on the outer envelopes. The Region also received inquiries from several employees and counsel for both parties about the situation, all of whom had an opportunity to provide input to the Regional Office as to what steps should be undertaken to rectify what at the moment appeared to be a snafu with the postage.

Given that the mail ballot election itself was largely due to COVID, as well as the well-known delays with the United States Postal Service, the Acting Regional Director ordered that another round of mail ballot kits, with proper postage, be immediately sent to all eligible mail-ballot employees and, to account for the delay, ordered that the election count be extended one week - from June 22, 2021, to June 29, 2021. The Employer immediately endorsed this



approach. In fact, and despite an opportunity to do so, the Employer lodged no objection to the Order or to the process.<sup>40</sup> Instead, the Employer's Human Resource Manager Conner informed the staff of this "error" and that the NLRB is "correcting it." Conner concluded her all-staff message with a note that implied the Press wanted the time for voting to be extended and to have the date of the count changed as well. Er. Ex. 3. As it turned out, the Region did precisely what Connor hoped for – the next day it extended the voting period and delayed the count for a full week. Dean Smith immediately messaged the staff with the same information, including assurances on how the ballots would be counted. JX 6.

As discussed, in the end the Region received duplicate ballots from a vast majority – Ruccia placed it at about 80% - of the employees who voted by mail. Thus, the Region ultimately received both the original mail ballot envelope as well as the envelope from the second round of mailing, thus assuring that every single employee in the unit's vote was counted. This suggests that the original concern about a lack of postage may not have been correct, and that the issue may have been simply another example of delays by the United States Postal Service than any "error" by Region 10. In any event, approximately 97% of the eligible voters cast ballots that were received by the Region and, excepting one void ballot, were counted in the election (or served as the basis for a challenge). This turnout is itself exceptional for union

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<sup>40</sup> At the hearing, the Employer complained because, counsel said, the Region had no "input" from the parties about how to handle the mail ballot question. Tr. 20. Yet, the facts are wholly to the contrary. Representatives of both parties consulted with Board Agent Jenkins on several occasions about these very questions, thus having at least an opportunity to offer input to address these questions. And the fact that no one lodged an objection to the Acting Regional Director's Order upon it being issued further confirms that this is a post-hoc rationalization for the fact that the Employer was disappointed with the results of the election.

elections,<sup>41</sup> and militates against any argument that the employees were adversely affected, or their voting rights prejudiced, by the issue with the mail ballots.

To be sure, the test in these situations turns on whether there is proof in the record that these events reasonably denied employees an adequate opportunity to vote. *Baker Victory Services, Inc.*, 331 NLRB 1068 (2000). This core piece of evidence is missing here: there is absolutely no evidence in this record that the ballot issue caused the other 3% of the eligible voters – three employees in total – not to vote. This omission, we submit, is fatal to the Employer's Objections.

Further, when the Region was confronted with these circumstances in the midst of a mail ballot election, it was, we submit, wholly proper for the Acting Regional Director to take the action set forth in the June 11, 2021, Order. Clearly, these were the very type of "unusual circumstances" that warranted the Acting Regional Director issuing an Order for a new round of ballots and for amending the date of the count that was in the Stipulated Election Agreement. In fact, the Stipulated Election Agreement expressly authorized the Acting Regional Director to modify the dates for the election. "If the election and/or count is postponed or cancelled, the

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<sup>41</sup> "[I]t is difficult to imagine any prejudice arising from the choice of a mail-ballot election when 94% of eligible voters cast ballots...." *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 256 (D.C. Cir. 2019).

Indeed, the number of ballots cast in this election, despite any issues with the mail envelopes, vastly surpassed recent NLRB elections. According to the NLRB.gov website, <https://www.nlr.gov/reports/agency-performance/election-reports> (August 27, 2021), the percent turnout for RC elections in April 2021, May 2021 and June 2021 was about 75% of the eligible voters. (April and May were 75%, June 77%). Here, there was a very impressive 97% voter turnout, thus flatly disproving the Employer's theory that any of this affected the employees' right to vote on this important issue or undermined the laboratory conditions for a fair election. See *Glass Depot, Inc.*, 318 NLRB 766 (1995)(need evidence that an event resulted in "less than a representative complement" of employees voting in the election).

Acting Regional Director, in his or her discretion, may reschedule the date, time and place of the election." JX 2, p. 6.<sup>42</sup> Here, neither the issuance of duplicate mail ballots or the extension of the election period actually raises a "reasonable doubt as to the fairness and validity of the election." *Polymers, supra*. If anything, the prompt, remedial action undertaken by Region 10 helped to assure that there was, as was the case, a "fair[] and valid[]" election. Simply stated, there is not a scintilla of evidence that any of the unit employees were disenfranchised because of any issues with the initial mail ballot envelopes – perhaps because of the action of the Acting Regional Director.<sup>43</sup>

The Employer's Objections regarding what happened at the count fare no better. With regard to Objection Number 4, which asserts that the Board Agent left the count for "seven (7) to ten (10) minutes, thus transferring control of the ballot count videoconference to a Union observer," the actual facts are to the contrary. First, the record does not establish that the Board Agent left the conference room for up to ten minutes.<sup>44</sup> Nor is there any evidence whatsoever that the Board agent "transfer[ed]" control of the Zoom session to the Union. Rather, the

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<sup>42</sup> Similarly, the Stipulated Election Agreement contemplates that the Region may send out a duplicate ballot kit to an employee who has not received the original mail ballot. JX 2, pi. 6.

<sup>43</sup> It is important to note that there was no evidence presented that any employee's right to vote was negatively affected by any delay in the mails. We recognize that three of the 77 employees did not vote, but the Employer, who had the burden of proof, offered no evidence that they were unable to vote because of any actions or omissions by the Region. Indeed, employees do not vote in NLRB elections all the time for a variety of reasons. There was no evidence that the mail ballot process was the reason any of the three did not vote. *See National Hot Rod Assn.*, 368 NLRB No. 26 (2019)(no evidence that the "Board's mail intake process was the reason that Veney's ballot was not counted").

<sup>44</sup> The only witnesses presented by the Employer, which has the burden of proof on its Objections, was Dean Smith who agreed that Ruccia was the host only for a minute or two. Tr. 89.



corroborated evidence establishes beyond doubt that the Board agent never left the physical conference room meeting but encountered technical computer issues that somehow resulted in Zoom transferring the "host" function to Ruccia for a matter of minutes. During that short interval, there was no "transfer[]" control of the ballot count."<sup>45</sup> In fact, the opening of the outer envelopes ceased while the technical problems were repaired, and then it resumed. Further, during this brief period when the Board agent had lost her video feed, her audio portion remained uninterrupted for everyone on the conference call. In short, despite this unavoidable computer glitch, there is no evidence that it adversely affected the integrity of the count in any way at all.

Objection Number 5 should be dismissed for the same reasons. Granted, there was a point when the Board Agent's computer audio unexpectedly died, but it lasted only a matter of minutes and during that period no ballots were counted. Rather, as Jenkins displayed the ballots on the screen and read off the vote, the observers quickly realized they could not hear her. The video remained intact and when the audio was restored, the display of ballots resumed, including the two ballots in progress when the audio was lost. Those two ballots, which had been displayed on the screen so that all observers could confirm the vote, were then included in the pile of ballots to be counted. Here, again, no one, including the Employer's counsel, objected at the time to the Agent's actions or how these two ballots were handled. This fleeting incident, not unlike when the video transmission was briefly interrupted, had no demonstrable effect at all on the integrity of the count, the validity of the actual ballots, or the results of the election.

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<sup>45</sup> To be clear, the actual ballot count had not yet commenced. When the video went out, Jenkins was merely opening the outer mailing envelopes to remove the inner, sealed envelopes containing the ballots. Tr. 173-76.

## 2. The Challenged Ballots

### A. Kristen Twardowski

It is clear that, under settled Board law, the Employer's challenge to the ballot of Twardowski should be summarily dismissed. The record is uncontroverted that Twardowski, a full-time employee since July 2015, submitted a resignation on June 24, 2021, but one that would not be effective until July 30, 2021, a full month after the election. Twardowski thus was a full-time employee, on the payroll, who worked on June 29, 2021. That's all that matters. "The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote, irrespective of what occurs after the election." *Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001).

Given that, Twardowski was unquestionably eligible to vote, and her ballot should be opened and counted.

### 2. Drew Sisk

We submit that the same analysis above compels the conclusion that Sisk, too, was eligible to vote in the election. Sisk was, by all accounts, a regular part-time employee on the date of the election, and his employment did not conclude until the end of the June 30, 2021, workday.<sup>46</sup> As he was an employee in the unit on the day the ballots were counted, his, too, should have been counted.

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<sup>46</sup> The standard for determining whether a part-time employee is eligible to vote in an election is if the employee averages four or more hours a week for the last quarter. *Woodward Detroit CVS*, 355 NLRB 1115 (2010). Here, Sisk worked ten hours a week for about the last thirteen months prior to the election, thus fully satisfying the Board's standard.

The Press seeks to dodge this conclusion by concocting an argument that Sisk was a temporary employee at the time of the election. The Board has long held that the test for an individual who has been classified as a temporary employee is whether their tenure is uncertain. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure is for a set, fixed duration, the employee may be ineligible as a temporary employee. Here, the record establishes that Sisk was never classified as a temporary employee – he was never informed he was, and none of the Employer's records reflect such a classification. Instead, Sisk was approved to work part-time first through the end of the calendar year 2020 and, when that approached, through the end of the fiscal year on June 30, 2021. Then, as June 2021 neared, Sisk's supervisor again inquired whether he was interested in staying on, indicating that was a genuine possibility. The fact that management ultimately decided to hire a replacement is of no moment to whether he satisfies the strict definition of temporary status.<sup>47</sup>

In the instant case, Sisk was merely a part-time employee, and was never treated or considered as a temporary worker with a fixed length of employment. The Board has, for more than fifty years, cautioned that the question to be determined in these cases is the individual's status "*as of the eligibility payroll date.*" *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982), emphasis added; *New World Communications*, 328 NLRB 3 (1999); *Belcher Towing Co.*, 122 NLRB 1019, 1020 (1959). In *Pen Mar*, the Board concluded that the employee was temporary because he was informed that he had been hired only for a fixed period with no expectation of permanent employment, and that he was a temporary as of the "*determinative August 27 eligibility date.*" *Id.*, emphasis added. Here, by comparison, the door for future

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<sup>47</sup> The fact that the employer may be seeking a replacement has been held by the Board to be irrelevant. *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 34 (1st Cir. 1978).

employment past the June 30 end of the fiscal year was expressly left open in November 2020, and again in mid-June 2021, weeks *after the eligibility date*, when Buchanan raised the issue once again with Sisk. Here, the Stipulated Election Agreement provided that the eligibility date for exempt employees was April 30, 2021, and May 9, 2021, for non-exempt. JX 2, p. 6. Either way, Sisk's employment status was still an open question on both dates given the last communication he had from his supervisor on November 12, 2020. Pet. Exh 11. Thus, as of the "determinative" eligibility date, the very last word Sisk had about his job status was one from his immediate supervisor who expressly did not establish a fixed, finite duration for his employment. She did precisely the opposite.

Under these circumstances, Sisk was certainly eligible to cast his ballot in the June 29, 2021, election. The challenge should be overruled, and his ballot opened and counted.

### 3. The Challenge to the Ballot of Michael Cornett Should be Upheld<sup>48</sup>

There is no dispute that the cornerstone of appropriate bargaining units is that the employees share a community of interest. Here, the record shows that Cornett, by his own admission, shares no community of interest with the Press employees. Granted, he edits a journal, but the bulk of his income, of his work time, and presumably his energies are devoted to management and academic functions with the University, not with the Press. Further, it is clear that over the years Cornett's role with the Press has diminished while his responsibilities and share of income from the University and the Center for Medieval and Renaissance Studies have increased. Unlike any other Press employee, the vast majority – 56% - of his income is derived

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<sup>48</sup> We recognize that the Petitioner's evidence was hearsay, but, as the Hearing Officer noted, the Board does consider hearsay evidence and "gives it such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141, 1141, n.1(1997). Here, the testimony from Korn was largely corroborated by the testimony and documents offered by the Employer.

from his separate responsibilities outside of the Press. While all Press employees are technically employees of the University, Cornett is far more a university and campus employee than an employee of the Press.

The record shows that Cornett, unlike any other Press employee, attends faculty meetings; is a member of the graduate faculty, supervises graduate student dissertations, is on the Dean's humanities team and, importantly, participated in the University's management strategy sessions when the faculty was involved in union organizing. Cornett has a separate job description for his academic work and his work office is located outside of the area of the Press.


Ultimately, as he conceded, Cornett should have no place in the bargaining unit and, for that reason, his ballot should not be counted. Given his twin roles for the University, he represents a major conflict of interest and, as he has said, does not share the requisite community of interest with the unit. While we recognize that an employee's own viewpoint as to their inclusion or exclusion from the unit properly is "seldom" considered, we suggest that the very unique facts of this case warrant an exception to the rule. *Texas Electric Service Co.*, 261 NLRB 1455, n.1 (1982); *Ideal Laundry & Dry Cleaning Co.*, 152 NLRB 1130, 1131, n. 6 (1955). As he recognized, Cornett's interests are far more aligned with the management and academic sectors of the University than with the rank-and-file employees of the Press. Given the facts, we submit that his admission that he should not be in the unit should be given substantial weight in determining whether his ballot should be counted.



## CONCLUSION

For the foregoing reasons, we urge the Hearing Office to deny the Employer's Objections to Conduct Affecting the Election, to deny the Employer's challenges to the ballots of Kristen Twardowski and Drew Sisk, and to uphold the Guild's challenge to the ballot of Michael Cornett.

Respectfully submitted,

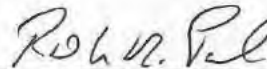


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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Post-Hearing Brief to the Hearing Officer was served this 30<sup>th</sup> day of August 2021, by electronic mail, on counsel for the Employer, Harrison Kuntz, Ogletree, Deakins, Nash, Smoak & Steward, 7700 Bonhomme Avenue, St. Louis, MO 63105.



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Robert E. Paul

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 7**

**DUKE UNIVERSITY,**

**Employer,**

**and**

**WASHINGTON-BALTIMORE NEWS  
GUILD, LOCAL 32035,**

**Petitioner.**

**Case No. 10-RC-276475**

**WASHINGTON-BALTIMORE NEWS GUILD'S  
ANSWERING BRIEF IN OPPOSITION TO EXCEPTIONS  
AND IN SUPPORT OF HEARING OFFICER'S REPORT**

As a fourth quarter, "Hail Mary" play amid its concern that it may have lost the union election, Duke University ("Employer" or "Duke") swings for the fences in its request that the Regional Director overturn the Report and Recommendation issued by Hearing Officer Matthew E. Ritzman. Ignoring both the facts and the applicable law, the Employer prays that a second election – one not at all warranted by the facts herein and the careful analysis of the Hearing Officer – would yield a more favorable result than the bargaining unit employees' majority vote in favor of being represented by the Washington-Baltimore News Guild, Local 32035 ("Guild" or "Union").<sup>1</sup>

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<sup>1</sup> The preliminary tally of ballots showed that of the 77 eligible voters, 35 voted for the Guild and 31 voted against the Guild, with 8 challenged ballots. JX 4.

## STATEMENT OF THE CASE

On May 3, 2021, the Guild filed a representation petition with Region 10 seeking to be certified as the collective bargaining representative of a unit of employees of the Duke University Press. Thereafter, the parties entered into a Stipulated Election Agreement for a mixed manual/mail ballot election. On June 29, 2021, the Region conducted a count of the ballots and issued a tally certifying that a majority of the employees had designated the Guild as their bargaining agent, although there were eight (8) challenged ballots which would determine the final results of the election.<sup>2</sup> Thereafter, Duke filed objections to conduct affecting the results of the election. A hearing was held on the challenges and objections on August 10 and 19, 2021 before Hearing Officer Ritzman of Region 7.<sup>3</sup>

On October 1, 2021, Hearing Officer Ritzman issued his Report and Recommendations on Determinative Challenged Ballots and Objections. With regard to the challenges, the Hearing Officer concluded, based on long-standing Board precedent, that the resignation of Kristen Twardowski had no legal effect on her eligibility to vote, and that Drew Sisk also was eligible to vote, despite the Employer's belated claim of temporary status, since he was clearly eligible on the eligibility date for the election. As to the Employer's challenges, the Hearing Officer found that neither a snag with postage on the originally mailed ballots nor the immaterial technological issues during the preparation for the count of ballots was a sufficient basis to warrant setting aside the election.

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<sup>2</sup> As the Employer points out, five of the eight challenges were later withdrawn by the parties. Of the remaining three challenges, the Hearing Officer recommended the rejection of the Employer's challenge to the ballots of Kristen Twardowski and Drew Sisk, and a rejection of the Guild's challenge to the ballot of Michael Cornett. The Employer has appealed the Hearing Officer's decision with regard to the Twardowski and Sisk ballots.

<sup>3</sup> By Order dated July 21, 2021, the case was transferred to Region 7. Board Exh. 1(b).

## STATEMENT OF THE FACTS

### A. The Election Objections

As noted, on May 3, 2021, the Guild filed the instant petition seeking to be certified as the representative of all full- and part-time employees of Duke University Press. JX 1. By May 13, 2021, the parties had agreed to a stipulated unit and Stipulated Election Agreement which, *inter alia*, set June 2, 2021, as the date for a manual election; established June 2, 2021, as the date for mail ballots to be sent to voters; and scheduled the count for June 22, 2021. JX 2.

As reflected by the June 11, 2021 Order issued by Lisa Henderson, Acting Regional Director of Region 10, it soon appeared that it was "unclear whether pre-paid deliver postage was included on the original return yellow envelopes" that contained an inner envelope with the ballots.<sup>4</sup> Field Examiner Ingrid Jenkins, who was handling the mechanics of the election, reported to both parties that by about June 10, 2021, no ballots had yet been returned to the Winston-Salem subregional office. By that date, several employees had been in contact with Field Examiner Jenkins, as had counsel for both parties,<sup>5</sup> about the fact that the pre-addressed

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<sup>4</sup> Before that, several employees had communicated with Field Examiner Jenkins about the matter. See Er. Exhs. 2, 17. Additionally, several admittedly anti-Guild employees circulated a message that employees should contact Jenkins. Er. Exh 4; Tr. 127. Testimony from employee Kelly Andrus about employee concerns and assertions that the region was "negligent" was admitted over the Guild's objection. Tr. 115, 119-121.

<sup>5</sup> The record amply reflects that both parties, and their respective counsel, were in frequent communications with the Field Examiner about the issue and the Region's anticipated response. Dean Smith, Director of Duke University Press, acknowledged that the Employer's counsel "always tells us he is in contact with the regional office and this is what's going to happen." Tr. 58. Counsel told Smith that he had, in fact, spoken directly to Jenkins about the issue and the issuance of new ballot kits. Tr. 58-59. Smith admitted that the Employer's counsel had two to three conversations with Board Agent Jenkins about the mail ballot issue and process. Tr. 61. Counsel reported these conversations to Smith, including his discussion [cont'd next page]

return envelopes somehow did not appear to contain USPS postage. The Board agent properly explained to those who reached out to her that everyone would receive a new ballot and that the deadline for returning the ballots would likely be extended. Er. Ex. 3.<sup>6</sup>

The next day, June 11, 2021, Acting Regional Director Henderson issued an "Order Rescheduling Ballot Count." The Order states, in relevant part:

It is unclear whether pre-paid deliver postage was included on the original return yellow envelopes. As result and in order to correct this administrative oversight, the Region will be issuing duplicate mail ballot election kits to all employees on the mail ballot voter list. All employees who want to vote in the election should return their mail ballot received from the duplicative mail ballot election kit that are being mailed out today, June 11, 2021. If you want to make sure that your vote will be counted in the election, you should send in the mail ballot you will be receiving from the mail ballot election kit mailed today, whether you sent in a mail ballot before or not. Please carefully follow the instructions included with your mail ballot election kit and please call the telephone numbers provided on the form should you have any questions.<sup>7</sup>

Additionally, and to afford time for the ballots to be received by the Regional Office, the Acting Regional Director rescheduled the count for June 29, 2021. "In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots on June 29, 2021." JX 3. Thereafter, a copy of the Order was distributed by the Employer to every

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with Jenkins about the fact that ballots would be reissued and that there would be an extension of the date to return ballots. Tr. 64. Whether the Employer literally "agreed" with the action of the Acting Regional Director or not, Tr. 38, Smith admitted that at no time did the Employer register an objection to the decision to issue new ballots or the extension of the date by which employees were to return their ballots. Tr. 65.

<sup>6</sup> As noted, the Board Agent discussed these steps with the Employer's counsel as well. Tr. 56-57, 58-59.

<sup>7</sup> Employee La Tasha Cowden wrote Jenkins to make sure that "duplicate" ballots were not counted. Er. Ex. 6. As set forth below, no duplicate ballots were counted.



employee and also included within the mail ballot election kits that went out on June 11, 2021.<sup>8</sup> The Employer's Human Resources Director, Bonnie Conner, and with the advance approval of Director Smith and the Employer's counsel, Tr. 56, 61, also issued an all-staff email on June 10, 2021 to notify them of the development, and to convey the steps to be taken by the NLRB to "correct" the situation. JX 5; Er. Exh. 3, p. 2. Conner invited any employee to contact Jenkins directly about the matter. Notably, neither party voiced an objection to this procedure or to the Order. Tr. 65.<sup>9</sup>

The count was held on June 29, 2021, as ordered by the Acting Regional Director. Field Examiner Jenkins conducted the count from a conference room in the Winston-Salem subregional office with the parties and observers attending via Zoom. As described in detail by Ruccia and Kelsea Smith, an assistant managing editor at the time, Jenkins had set up her laptop for video and was using her phone for audio; Jenkins explained that there were "some internet issues that made it problematic to run audio through her computer." Tr. 161. Jenkins panned the room with her computer camera so everyone could confirm no one else was in the room, and that the only materials were a pile of envelopes and a sealed box containing the ballots from the June 2 manual election. Tr. 161-62, 195.<sup>10</sup> Jenkins walked through how the count would occur and

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<sup>8</sup> Initially, as explained by Dan Ruccia, a marketing designer with the Press for about 8 years, there were employees who were a little confused and disappointed by the issue with the mailed ballots, but once the Region issued the Order employees simply followed the procedure. Tr. 159. Ruccia had several conversations with Jenkins, as did other employees and counsel. Tr. 159.

<sup>9</sup> Lisa Savage, one of the employees who had been in contact with the Field Examiner about the postage, later confirmed with the Field Examiner that both of her ballots, the original and the duplicate ballot, had been received by the Region in time for the count. Er. Exh. 18.

<sup>10</sup> Dean Smith agreed that no one was in the physical room other than Jenkins during the pre-count meeting or the count itself. Tr. 69, 71.

after answering questions took a break before the actual ballot count got underway. During the break, the computer camera remained focused on the ballots. Tr. 163-64.

The count session began at 1pm.<sup>11</sup> As Ruccia explained, the first order of business was to review the mail-in ballots to ascertain if there were duplicates from the same employee; determine, if so, which was the first ballot received, and to hear any challenges lodged by the parties. Tr. 164-65.<sup>12</sup> Field Examiner Jenkins had organized the ballots in alphabetical order according to the employee list, and any duplicate ballot envelopes from an employee were grouped together. Tr. 165-66.<sup>13</sup> Jenkins then displayed on the screen each envelope so that the party representatives could examine the envelopes and confirm which ballot had been returned to the regional office first. The earlier of the two ballots was placed in the pile; the later-received ballot envelope was set to the side. *Id.*; Tr. 84. As attested to by both Ruccia and Kelsea Smith, approximately 80% of the mailed in ballots were duplicates – thus establishing that both the original ballot envelope and the duplicate ballots mailed out on June 11, 2021 had ultimately been received in the Regional Office from an "overwhelming majority" of the voters.<sup>14</sup> Tr. 163,

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<sup>11</sup> Dean Smith and the Employer's counsel both attended and observed the entire count. Tr. 99-100, 102-03.

<sup>12</sup> Dean Smith was unable to recall these steps undertaken by the Board Agent. Tr. 81.

<sup>13</sup> A photo of one of the ballot kits, addressed to employee Kelly Andrus, was introduced as Er. Exh. 5.

<sup>14</sup> La Tasha Cowden, one of the employees called by the Press to testify about the election issue, was concerned about a duplication of ballots, Tr. 144-45, 150, but admitted that her concern would be satisfied if most of the original ballots were ultimately received by the Regional Office. Tr. 150-51.

166.<sup>15</sup> After Field Examiner Jenkins had reviewed all of the ballots in the room, she announced she was going to check with the Regional Office to determine whether any additional ballots had arrived that day.<sup>16</sup> Tr. 167, 199-200. Jenkins left the audio intact as well as the computer camera focused on the ballots,<sup>17</sup> departed the room for a couple of minutes and returned with two new envelopes. Tr. 78, 167-68; 200. No one objected to Jenkins' effort to verify whether additional ballots had been received or to the inclusion of these two ballots in the count. Tr. 79, 169, 200.

At that juncture, Jenkins turned to the sealed box containing ballots from the June 2, 2021, manual election. At one point the Guild voiced an arguably late challenge to the ballot of Kelly Andrus, and Jenkins briefly left the room – leaving the ballots on camera in full sight of the parties – to confer with the Regional Director. Tr. 170-71.

At approximately 2:00pm, Jenkins, as host of the Zoom meeting, began to admit observers into the virtual room. Tr. 171-72. She first took the pile of mailed-in ballots that were to be counted and announced that she would be removing the inner envelopes from the outer envelopes. She took a letter opener to cut open the yellow outer envelope, removed the inner envelop (containing the ballot), and placed the inner envelopes on the table. Tr. 173. At some point while this was in progress, the Board Agent announced that her laptop battery was running low on power and, within moments, the video of the count ceased when her laptop ran out of

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<sup>15</sup> Kelsea Smith clearly recalled that there were two mailed in ballots from a "vast majority" of the employees who voted by mail. Tr. 197. Dean Smith could not offer a percentage, but readily agreed that "most" of the envelopes represented two ballots from the same employee. Tr. 74.

<sup>16</sup> This effort was consistent with the Order of the Acting Regional Director, and standard mail ballot procedure, that all ballots received by the time of the actual count would be considered. JX 4.

<sup>17</sup> Contrary to Dean Smith, the parties could see the ballots when Jenkins left the physical conference room. Tr. 41, 44.



power.<sup>18</sup> Tr. 174, 202-03. This brief loss of video had no effect on the audio which continued uninterrupted. Tr. 174.

As the Field Examiner was seeking to remedy the power to her computer, Ruccia suddenly was labeled the "host" of the Zoom session.<sup>19</sup> Tr. 175. During the about five minutes until Jenkins was restored as host,<sup>20</sup> not a single ballot was opened or counted, and there was no difficulty in communicating with Jenkins on audio. Tr. 175-76, 204-05. Additionally, and other than the camera angle being different – presumably because Jenkins had relocated her computer to be closer to an electric outlet – there was no change at all in the location of the ballots or the envelopes when Jenkins' video was restored. Tr. 176-77.

Once Jenkins reacquired her role as the host of the meeting, she returned to the task of opening the outer envelopes – first of the mailed-in ballots and then of the ballots from the manual election. Tr. 177. Around 2:50pm, about 15 minutes into this process, the audio of her phone went out. Tr. 179. The video was not affected. Tr. 180. Jenkins understandably did not immediately realize that the audio had stopped. "So she showed one ballot [to the camera] and was presumably reading off what it was and put it in the pile and was going on to the next one

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<sup>18</sup> The impact was that Jenkins' image was no longer on the screen, although the "thumbnail[]" images of the observers were not affected. Tr. 87.

<sup>19</sup> Despite Dean Smith's bald assertion that "Dan [Ruccia] stepped in to become the host of the meeting," Tr. 87, the record firmly establishes that no one, including Ruccia, took any "steps" whatsoever for that to occur. Tr. 203-04. Instead, as Ruccia theorized at the hearing, the algorithms built into Zoom may have made him the host automatically as he had been the person at the meeting for the longest period of time. Tr. 175. The record understandably does not contain a scintilla of evidence and, in particular, not even a hint, that anyone from the NLRB or the Guild made Ruccia the temporary host. Tr. 204. Dean Smith ultimately admitted that he had no information that Ruccia did anything to become temporary host. Tr. 89.

<sup>20</sup> The Employer, sponsor of the Objections, thought Ruccia served as host only for a minute or two. Tr. 89.

and someone unmuted and said we couldn't hear her." Tr. 180. Kelsea Smith recalled the moment:

At some point while she had held up a ballot, she opened a ballot and/or pulled up a ballot and we didn't hear her read anything. We didn't hear her voice announce what is like we had been when we saw her hold it up to the camera and we saw it was a "yes" vote, she put it in "yes" pile and she pulled out another ballot. And I think that's when someone said, "Ingrid, we can't hear you." So she paused and kept the ballot in her hand, and we saw her shuffling around with the computer to get audio back.

Tr. 206-07. Ruccia described what happened next.

She, you know, immediately I think came over to her computer and did what she needed to do to restore audio. It couldn't have been more than like a minute or two, it was [a] very quick process.

Tr. 180. During that interval, Jenkins did not continue to open or count any ballots.<sup>21</sup> Once her audio was restored, Jenkins completed the count,<sup>22</sup> confirmed that the tally of ballots comported with the tallies that were being taken by the observers, and announced the result of the election.

Tr. 181. Ultimately, approximately 97% of the eligible voters cast ballots in the election. Tr. 97-98.<sup>23</sup>

At no time during the session did anyone from the Employer object to the process or what had transpired. Tr. 182.<sup>24</sup>

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<sup>21</sup> Contrary to the recollection of Dean Smith, no ballots were actually counted during this brief moment without audio. Tr. 49.

<sup>22</sup> Without objection from either party, Jenkins properly included in the count the two ballots that were being reviewed when her audio briefly went out. Tr. 95.

<sup>23</sup> While Savage said she "did not have faith in the NLRB" due to the issue with the ballots, both her original ballot and her duplicate ballot were timely received by the Region, and her ballot was counted. Tr. 230, 233, 276.

<sup>24</sup> Dean Smith claimed at the hearing that the "errors ... cast doubt on the validity of the election for our employees." Tr. 48. Other than what he learned from counsel, Smith's [cont'd next page]

## B. The Challenged Ballots

### 1. Kristen Twardowski

Kristen Twardowski commenced her employment with the Press on July 13, 2015, and eventually became a library sales manager. Tr. 256-57. By late June 2021, Twardowski had obtained a position with another employer, and to provide as much advance notice of her departure as possible, transmitted a resignation email to her supervisor on June 24, 2021. Pet. Exh. 1; Er. Exh.10; Tr. 257. Twardowski worked as a full-time Press employee both on the day of the June 29, 2021, election as well as through July 30, 2021. Tr. 245, 253, 257, 259.

On June 28, 2021, Twardowski was notified of her new rate of pay effective July 1, 2021, as well as her entitlement to a \$1,000 annual bonus. Pet. Exh. 2. She received the bonus, and her pay was increased as of July 1, 2021, and continued at that rate through the end of her employment. Tr. 258-59.

### 2. Christopher "Drew" Sisk

Drew Sisk began his employment with the Press on January 15, 2019, as a book designer and on a full-time basis. By July 2020, Sisk had relocated to Tennessee to take a teaching position at Tennessee Tech University. As a result, Sisk proposed to his supervisor, Amy

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source of information was from two employees. Tr. 54. Andrus, who openly sought to support this notion as an admittedly anti-union employee, conceded that she had only spoken with four or five employees – out of 78 potential voters – about the election. Tr. 124. And while Andrus initially sent Field Examiner Jenkins a message on May 29, even before the election began, she never followed up. Er. Exh. 2; Tr. 127, 139.

Moreover, at the hearing the Employer hinted at a claim that Board Agent Jenkins was biased in favor of the Guild because she replied to pro-Guild employee Roy Pattishall but not to anti-Union employees Andrus or Cowden. Tr. 114-15, 146. The notion is both reprehensible and without factual support at all. The record shows that Jenkins conversed with the Employer's counsel on a number of occasions, and responded to emails from other employees, including Andrus. Er. Exhs. 17-18.

Buchanan, that he covert to part-time status through the end of 2020. Er. Exh 13; Tr. 263. The Press agreed, and Sisk reduced his 40 hour per week work schedule to a regular 10 hour per week schedule. Tr. 263.

A few months later, as Sisk was approaching the end of the calendar year, he and Buchanan revisited his status and the Press agreed he would continue his part-time job at least through June 30, 2021. In a November 12, 2021, email to Sisk, Buchanan announced that his situation had been approved to continue through the end of the fiscal year, June 30, but expressly left the door open to a further continuation. Buchanan put it simply: "And if this hiring freeze drags on, as I expect it will, maybe longer, if you remain interested." Pet. Exh. 11; Tr. 264.<sup>25</sup> Sisk understood the message: "And then at that point in November when it was like hey, you know, we can extend you to June 30<sup>th</sup>, and possibly further, you know. I knew that I could balance it, so it seemed to me that the door was open with the understanding that officially it was approved through June 30<sup>th</sup>, but with that door open, yeah." Tr. 274. As the Hearing Officer concluded, Sisk's status was, as of the critical eligibility date, "uncertain." Report, p. 8.

When June 2021 rolled around, Buchanan inquired as to whether Sisk would be interested in continuing his employment past June 30, 2021. He responded that he was "open to it." Tr. 265. But by about mid-June, Buchanan informed him that the Press had decided not to

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<sup>25</sup> At the hearing, HR manager Bonnie Conner sponsored several email exchanges generated in this time frame to describe the agreement regarding Sisk's work schedule. Er. Exh. 14, 15; Tr. 248-50. In her testimony, she labeled Sisk a "temporary" employee, but she admitted that there was no reference whatsoever to any "temporary" status in any of the email correspondence. Tr. 248, 253-54. Indeed, Sisk confirmed that no one had ever referred to his position as "temporary." Tr. 267. The Press' formal "Employee Data Sheet," admitted into the record as Petitioner's Exh. 13, also makes no reference to any "temporary" status. Instead, it lists a "planned wks/yr" of 52."

continue his employment after June 30, 2021.<sup>26</sup> As a result, Buchan solicited Sisk to write a resignation letter, and he did so in June on June 28, 2021. Pet. Ex. 12; Tr. 266, 276. Sisk penned a "goodbye" note to his colleagues on June 30, 2021, his last day as a Press employee. Er. Exh. 16.

## ARGUMENT

Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstances. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.

*Polymers, Inc.*, 174 NLRB 282 (1969) (n omitted), *enfd.* 414 F.2d 999 (2<sup>nd</sup> Cir. 1969), *cert. denied* 396 U.S. 1010 (1970).<sup>27</sup> Stated differently, the litmus test always is whether any misconduct "so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004). Indeed, "[t]he Board 'requires more than mere speculative harm to overturn an election.' *J. C.*

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<sup>26</sup> Conner confirmed that Buchanan had inquired about Sisk remaining on board after June 30, 2021. Conner testified that by that point the Employer had hired his replacement and, thus, they could not retain him. Tr. 319.

<sup>27</sup> There, the company challenged the manner in which the election box was sealed and the fact that the agent did not retain physical custody of the box at all times. The Board observed that these cases are fact-specific and dismissed these concerns as there was "only the most remote possibility that anything untoward occurred." In short, the Board found there was "no reasonable possibility of irregularity inhered in the conduct of the election." *Id.* at 283.



*Brock Corp.*, 318 NLRB 403, 404 (1995).<sup>28</sup> In this case, Duke's Exceptions ignore this admonition. The Employer repeatedly posits these events "possibly affected" the election, but offers no proof – indeed, there is none – that they actually did. Exceptions, pp. 3, 15 ("possibility exists"), 17 ("grounds for speculation about fairness").

With regard to election agreements, it is well-established that a regional director has some discretion in connection with election agreements as these agreements are considered contracts between the parties. *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968). Indeed, the NLRB Casehandling Manual confirms that "exceptional circumstances" may warrant deviation from the Stipulated Election Agreement. See Section 11090, NLRB Casehandling Manual, Part Two. If there is an alleged violation of the terms of the election agreement, the issue always is whether "the breach is 'material or prejudicial'...." Indeed, "unusual circumstances [may make] the agreement impossible to perform." *T&L Leasing*, 318 NLRB 324, 326 (1995). The Board has noted that "conducting an election during the COVID-19 pandemic raises unprecedented challenges." *Balfour Beatty Communities, LLC*, 2020 WL 2768914 (2020).

Finally, it is axiomatic that "[t]t is the Employer's burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election." *Consumers Energy Co.*, 337 NLRB 752 (2002). "The burden of proof...is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005).

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<sup>28</sup> For example, in *Sawyer Lumber, LLC*, 326 NLRB 1331 (1998), the allegation was that the election should be set aside because the observers and Board agent took breaks and left the polling area, thus leaving the open ballot box unsecured. The Board held that this mere speculation of irregularity did not warrant that the election be set aside. In the instant case, each occasion that Field Examiner Jenkins left the physical conference room she left the video on the ballots, and when the audio or video went out the other method of communication remained intact. As in *Sawyer Lumber*, the Employer's exceptions here are not supported by any *facts* of actual harm to the integrity of the election or the actual counting of the ballots.

The Employer's Exceptions to the Hearing Officer's Report  
Regarding its Objections Should be Denied

As set forth in its Exceptions, the Employer asks the Region to invalidate the June 29, 2021, election. The Exceptions are properly grouped into two categories – (1) claims that relate to the actions of the Acting Regional Director when she issued another round of mail ballots to eligible voters and ordered an extension of the election date to June 29, 2021, and (2) assertions relating to what took place during the June 29, 2021, count. Neither of these allegations, we submit, justify the Employer's extraordinary request under these circumstances to invalidate the properly held election.

Let's look at the record. As a result of the Stipulated Election Agreement, the election commenced on June 2, 2021, when the three employees who worked in the warehouse were entitled to vote and when ballots were mailed out to all of the other employees in the unit. By June 10, 2021, the Region became concerned that it had not yet received any marked ballots in the mail, and had received information suggesting that insufficient, or no, postage had inadvertently been on the outer envelopes. The Region also received inquiries from several employees and counsel for both parties about the situation, all of whom had an opportunity to provide input to the Regional Office as to what steps should be undertaken to rectify what at the moment appeared to be a snafu with the postage.

Given that the mail ballot election itself was largely due to COVID, as well as the well-known delays with the United States Postal Service, the Acting Regional Director ordered that another round of mail ballot kits, with proper postage, be immediately sent to all eligible mail-ballot employees and, to account for the delay, ordered that the period for voting be extended one week - from June 22, 2021, to June 29, 2021. Contrary to its litigation position, the Employer immediately and openly endorsed this approach. In fact, and despite an opportunity to do so, the

Employer lodged no objection to the Order or to the process.<sup>29</sup> Instead, the Employer's Human Resource Manager Conner informed the staff of this "error" and that the NLRB is "correcting it." Conner concluded her all-staff message with a note that implied the Press wanted the time for voting to be extended and to have the date of the count changed as well. Er. Ex. 3. As it turned out, the Region did precisely what Connor hoped for – the next day it extended the voting period and delayed the count for a full week. Dean Smith immediately messaged the staff with the same information, including assurances on how the ballots would be counted. JX 6.

As discussed, in the end the Region received duplicate ballots from a vast majority – Ruccia placed it at about 80% - of the employees who voted by mail. Thus, the Region ultimately received both the original mail ballot envelope as well as the envelope from the second round of mailing, thus assuring that every single employee in the unit had their vote counted. This suggests that the original concern about a lack of postage may not have been correct, and that the issue may have been simply another example of delays by the United States Postal Service rather than any "error" by Region 10. In any event, approximately 97% of the eligible voters cast ballots that were received by the Region and, other than one void ballot, were

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<sup>29</sup> At the hearing and in its Exceptions, the Employer complains because, counsel said, the Region had no "input" from the parties about how to handle the mail ballot question. Tr. 20; Exceptions, p. 13 (Region issued the Order "without the consent, or even the input, of the parties."). Yet, the facts are to the contrary. As the record firmly established, representatives of both parties consulted with Board Agent Jenkins on several occasions about these very questions, thus having at least an opportunity to offer input to address these questions. And the fact that no one complained to the Acting Regional Director when the Order was being issued further confirms that this is a post-hoc rationalization for the fact that the Employer is simply disappointed with the results of the election, nothing more.

Duke responds with the argument that under Board rules it was entitled to raise this issue in its Objections. That's not the point. We submit that the Employer's belated argument – was it just rolling the dice? – should be viewed with skepticism since it fully and openly endorsed the Acting Regional Director's response at the time.



counted in the election (or served as the basis for a challenge). This turnout is itself exceptional for union elections,<sup>30</sup> and militates against any argument that the employees were adversely affected, or their voting rights prejudiced, by the issue with the mail ballots.<sup>31</sup>

To be sure, the test in these situations turns on whether there is proof in the record that these events reasonably denied employees an adequate opportunity to vote. *Baker Victory Services, Inc.*, 331 NLRB 1068 (2000). This core piece of evidence is missing here: there is absolutely no evidence in this record that the ballot issue caused the other 3% of the eligible

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<sup>30</sup> "[I]t is difficult to imagine any prejudice arising from the choice of a mail-ballot election when 94% of eligible voters cast ballots...." *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 256 (D.C. Cir. 2019).

Indeed, the number of ballots cast in this election, despite any issues with the mail envelopes, vastly surpassed recent NLRB elections. According to the NLRB.gov website, <https://www.nlr.gov/reports/agency-performance/election-reports> (August 27, 2021), the percent turnout for RC elections in April 2021, May 2021 and June 2021 was about 75% of the eligible voters. (April and May were 75%, June 77%). Here, there was a very impressive 97% voter turnout, thus flatly disproving the Employer's theory that any of this affected the employees' right to vote on this important issue or undermined the laboratory conditions for a fair election. See *Glass Depot, Inc.*, 318 NLRB 766 (1995) (need evidence that an event resulted in "less than a representative complement" of employees voting in the election).

<sup>31</sup> In its Exceptions, the Employer seeks help from the closeness of the vote in a transparent effort to bolster its fallacious claims. First, the cases on which the Employer relies are patently distinguishable. In *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614, 615 (2002), the issue concerned the impact of repeated physical threats of a number of voters, and that persuaded the Board to set aside the election – facts wholly unlike the postage and technological issues herein. The other case relied upon by Duke, *Gonzales Packing Co.*, 304 NLRB 805 (1991), is equally beside the point, as it involved unfair labor practices by a supervisor who supervised about half of the unit employees. Granted, the Board did mention the closeness of the election as the last of a list of factors but cited "the nature of [the supervisor's] conduct, its proximity in time to the election, the number of employees that [the supervisor] solicited that day, [and] the likelihood [that others in the department] witnessed "her repeated unfair labor practice...." More importantly, regardless of the margin of this election, the record is devoid of any probative evidence that either the issue with the postage or the computer issues at the count actually had any effect at all on the number of votes or the outcome.

voters – *three employees in total* – not to vote. This omission, we submit, is fatal to the Employer's Objections.<sup>32</sup>

Further, when the Region was confronted with these circumstances in the midst of a mail ballot election, it was, we submit, wholly proper for the Acting Regional Director to take the action set forth in the June 11, 2021, Order. Clearly, these were the very type of "unusual circumstances" that warranted the Acting Regional Director issuing an Order for a new round of ballots and for amending the date of the count that was in the Stipulated Election Agreement. In fact, the Stipulated Election Agreement expressly authorized the Acting Regional Director to modify the dates for the election. "If the election and/or count is postponed or cancelled, the Acting Regional Director, in his or her discretion, may reschedule the date, time and place of the election." JX 2, p. 6.<sup>33</sup> Contrary to the Employer, there is nothing in this language that limits its

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<sup>32</sup> Duke's effort to explain away why it did not present evidence of actual harm is unconvincing. We recognize that an employer may not lawfully ask an employee if they voted or how they voted, but that's not the issue here. Both parties *know* who did not vote as the names of voters were "checked off" by both sides, and the Board agent, when they participated in the virtual ballot count. Thus, the issue here is not to inquire of an employee whether they voted, but the employer theoretically could have presented evidence from the three employees as to whether they received one or both of the ballots. The burden of proof on that issue was, after all, on the Employer. As a result, the Employer's assertion in its Exceptions that "the three (3) voters for whom a ballot was not timely received could affect the outcome" is flatly misleading. Exceptions, p. 4, fn. 5. Further, the fact that ballots were not returned by three employees (maybe they just chose not to vote?), but were from every other employee, strongly validates the conclusion that the postage issue in the end had no effect on the propriety of the election. *See National Hot Rod Assn.*, 368 NLRB No. 26 (2019) (no evidence that the "Board's mail intake process was the reason that Veney's ballot was not counted").

<sup>33</sup> Similarly, the Stipulated Election Agreement contemplates that the Region may send out a duplicate ballot kit to an employee who has not received the original mail ballot. JX 2, pi. 6.

reach to the manual portion of the election pertaining to COVID issues. The Acting RD acted fully in accord with the Stipulated Election Agreement.<sup>34</sup>

Further, neither the issuance of duplicate mail ballots or the extension of the election period actually raises a "reasonable doubt as to the fairness and validity of the election."

*Polymers, supra*. If anything, the prompt, remedial action undertaken by Region 10 helped to assure that there was, as was the case, a "fair[] and valid[]" election.<sup>35</sup> Simply stated, there is not a scintilla of evidence that any of the unit employees were disenfranchised because of any issues with the initial mail ballot envelopes – perhaps because of the prompt action of the Acting Regional Director.

Indeed, the Hearing Officer properly distinguished the cases on which the Employer relies.

Therefore, the Employer's evidence of prejudicial harm is merely speculative. The Employer's reliance on *Fresenius USA Manufacturing Inc.*, 352 NLRB 679 (2008), and *Paprikas Fono*, 273 NLRB 1326 (1984) in support of this objection, is misplaced. In *Fresenius USA*, the Board agent failed to properly secure ballots after the election and failed to properly display ballots during the count. In *Paprikas Fono*, Regional Staff opened sealed challenge envelope and examined

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<sup>34</sup> Duke asks this Regional Director to conclude that the Acting Regional Director for Region 10 erred by an "insufficient postponement period" as set forth in her Order. Exceptions, p. 12, n 11. But there is not a scintilla of evidence that the extra week of voting was "insufficient." Indeed, as noted, all but 3 employees voted, and with both ballots from 80% of the unit being returned, and there is no evidence that the extra week was "insufficient" for anyone.

<sup>35</sup> The Hearing Officer properly noted that all of the employee-witnesses actually cast ballots in the election. Report, p. 14. The Employer seeks to cast this point aside, but actually misses it. Duke asserts that the Hearing Officer's statement "says nothing about the magnitude nor the impact of the failure [with postage]." But it does exactly that. The fact that *all* of the witnesses ended up casting ballots that were included in the count further demonstrates that the Region's potential slip-up with the postage had no material effect at all on the election. (We say "potential" slip-up since, in the end, as the record reflects, the Region received duplicate ballots from 80% of the unit.) There was not a single witness who testified that they did not receive a ballot. Manifestly, the postage issue did not "undermine[] the adequacy of employees' opportunity to vote...." Exceptions, p. 7.

challenges outside the presence of the parties. Neither of those cases involve conduct by a Board agent that is comparable to the record evidence herein. Instead, the record shows that upon becoming aware of the postage issue, the Region promptly issued duplicate mail ballot election kits to all employees on the mail ballot voter list.

Report, p. 14. Duke renews its argument in its Exceptions, but the Hearing Officer's conclusion represents a proper reading of the law.<sup>36</sup>

The Employer's Exceptions regarding what happened at the count fare no better. As noted, Duke contends that the two technological glitches – with the Agent's audio going out for a minute or so and then the video having brief problems – somehow compromised the integrity of the election. Nothing could be further from the truth. Rather, the corroborated evidence establishes beyond doubt that the Board agent never left the physical conference room meeting but encountered technical computer issues for a matter of minutes. During those short intervals, there was no "transfer[] control of the ballot count."<sup>37</sup> In fact, the opening of the outer envelopes ceased while the technical problems were repaired, and then it resumed. Further, during this brief period when the Board agent had lost her video feed, her audio portion remained uninterrupted for everyone on the conference call. In short, despite this unavoidable computer glitch, there is no evidence that it adversely affected the integrity of the count in any way at all.

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<sup>36</sup> The Employer's reliance on *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008) is wholly misplaced. There, there was specific evidence of material errors by the Board agent, including the agent's refusal to display the ballots at the count for the parties' inspection, failure to secure the ballot box before taking the ballots to his home over a weekend, and incorrectly identifying a ballot during the count. Here, by contrast, there was no error by the Board agent. It is possible that there was an issue with the postage – although most ballots arrived at the Region – but nothing was done improperly by the agent during the count.

<sup>37</sup> To be clear, the actual ballot count had not yet commenced. When the video went out, Jenkins was merely opening the outer mailing envelopes to remove the inner, sealed envelopes containing the ballots. Tr. 173-76.



The same result obtains with regard to the point when the Board Agent's computer audio unexpectedly died, but it lasted only a matter of minutes and during that period no ballots were counted. Rather, as Jenkins displayed the ballots on the screen and read off the vote, the observers quickly realized they could not hear her. The video remained intact and when the audio was restored, the display of ballots resumed, including the two ballots in progress when the audio was lost. Those two ballots, which had been displayed on the screen so that all observers could confirm the vote, were then included in the pile of ballots to be counted. Here, again, no one, including the Employer's counsel, objected at the time to the Agent's actions or how these two ballots were handled. This fleeting incident, not unlike when the video transmission was briefly interrupted, had no demonstrable effect at all on the integrity of the count, the validity of the actual ballots, or the results of the election.

In the end, the Employer pleads with the Regional Director to conclude that even if each of these events do not warrant a vacatur of the election, the cumulative effect of these matters do. We submit that the Employer forgets that  $0+0+0$  still equals 0. There is clearly no basis on this record for the Regional Director to conclude that while the postage issue had no actual effect on voting opportunities, and the technological events during the count also did not affect the election, that somehow all of these entirely separate events compel that the employees' wishes as expressed in the election be cast aside. Such an argument is flagrant effort to jettison the Board's historical view of the sanctity of Board elections, and should not be condoned.

## The Challenged Ballots

### Voter Eligibility

The cases are legion that to be eligible to vote in an NLRB election an employee must be in the unit on the eligibility date and working in employee status on the election date, nothing more. *Nichols House Nursing Home*, 332 NLRB 1428, 1429 (2000); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973); *Plymouth Towing Co.*, 178 NLRB 651 (1969). Changes in employee status that transpire *after* the election date are of no moment.

The Board has frequently held that:

the eligibility of voters in Board elections is to be determined on the basis of employment status of each voter during the eligibility period and at the time of the election. *Accordingly, any change in employment status subsequent to the election is immaterial with regard to eligibility in an election.*

*North General Hospital*, 314 NLRB 14, 15 (1994) (emphasis in original). Thus, an employee who is set to become a supervisor after the election is still eligible because they were eligible on the date of the election. *Nichols House Nursing Home*, 332 NLRB 1428 (2000); *Grange Debris Box & Wrecking Co.*, 344 NLRB 1004 (2005) (employee was eligible who had given notice but was employed on the election date). Similarly, an individual who is an eligible employee on the date of the election is entitled to have their ballot counted even if that employee intends to quit after the election. *Magic Beans, LLC*, 352 NLRB 872 (2008)<sup>38</sup>; *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1444 (9<sup>th</sup> Cir. 1093).<sup>39</sup>

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<sup>38</sup> There, the Board cited *Personal Products Corp.*, 114 NLRB 959, 961 (1955), for the proposition that an employee who gave notice to the employer that she would quit two days after the election was eligible to vote.

<sup>39</sup> *Cf. Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001) (employee not eligible who terminated employment and stopped working before the election).

A. Kristen Twardowski

As found by the Hearing Officer, the record is uncontroverted that Twardowski, a full-time employee since July 2015, submitted a resignation on June 24, 2021, but one that would not be effective until July 30, 2021, a full month after the election. Twardowski thus was a full-time employee, on the payroll, who worked on June 29, 2021. As a result, the Hearing Officer concluded that Twardowski was clearly eligible to vote in the election. "The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote, irrespective of what occurs after the election." *Dakota, supra*.<sup>40</sup>

In its Exceptions, the Employer disregards this settled law. Further, the Employer misunderstands the relevance of the compensation letter Twardowski received on July 1, 2021. The letter merely confirms that she, like all other unit employees at the time, was entitled to a wage increase and bonus. The fact that Twardowski was leaving the Employer at the end of the month was clearly immaterial. It is, as noted, equally immaterial to her eligibility to vote.

2. Drew Sisk

As found by the Hearing Officer, Sisk was, by all accounts, a regular part-time employee on the date of the election, and his employment did not conclude until the end of the June 30,

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<sup>40</sup> Moreover, the Employer's reliance on the Stipulated Election Agreement's reference to an employee who "quit[s]" is misplaced. The actual sentence addresses an employee who "quit[s] or been discharged for cause after the designated payroll period for eligibility...." Clearly, that language has no application to an employee who, like Twardowski here, is still actively employed as of the eligibility date and on the date of the election.

2021, workday.<sup>41</sup> As he was an employee in the unit on the day the ballots were counted, his, too, should have been counted.

Duke seeks to dodge this conclusion by concocting an argument that Sisk was a temporary employee at the time of the election. The Board has long held that the test for an individual who has been classified as a temporary employee is whether their tenure is uncertain. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure is for a set, fixed duration, the employee may be ineligible as a temporary employee. Here, the record establishes that Sisk was never classified as a temporary employee – he was never informed he was, and, as the record demonstrates, none of the Employer's records reflect such a classification. Instead, Sisk was approved to work part-time first through the end of the calendar year 2020 and, when that approached, at least through the end of the fiscal year on June 30, 2021, leaving the door open to continued employment thereafter. Then, as June 2021 neared, Sisk's supervisor again inquired whether he was interested in staying on, indicating that was a genuine possibility. The fact that management ultimately decided to hire a replacement is beside the point as to whether he satisfied the strict definition of temporary status.<sup>42</sup>

In the instant case, Sisk was merely a part-time employee, and was never treated or considered as a temporary worker with a fixed length of employment. The Board has, for more than fifty years, cautioned that the question to be determined in these cases is the individual's

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<sup>41</sup> The standard for determining whether a part-time employee is eligible to vote in an election is if the employee averages four or more hours a week for the last quarter. *Woodward Detroit CVS*, 355 NLRB 1115 (2010). Here, Sisk worked ten hours a week for about the last thirteen months prior to the election, thus comfortably satisfying the Board's standard.

<sup>42</sup> The fact that the employer may be seeking a replacement has been held by the Board to be irrelevant. *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 34 (1st Cir. 1978).



status "*as of the eligibility payroll date.*" *Pen Mar Packaging Corp.* , 261 NLRB 874, 874 (1982), emphasis added; *New World Communications*, 328 NLRB 3 (1999); *Belcher Towing Co.*, 122 NLRB 1019, 1020 (1959). In *Pen Mar*, the Board concluded that the employee was temporary because he was informed that he had been hired only for a fixed period with no expectation of permanent employment, and that he was a temporary as of the "*determinative August 27 eligibility date.*" *Id.*, emphasis added. Here, by comparison, the door for future employment past the June 30 end of the fiscal year was expressly left open in November 2020, and again in mid-June 2021, weeks *after the eligibility date*, when Buchanan raised the issue once again with Sisk. In this case, the Stipulated Election Agreement provided that the eligibility date for exempt employees was April 30, 2021, and May 9, 2021, for non-exempt. JX 2, p. 6. Either way, Sisk's employment status was still an open question on both dates given the last communication he had from his supervisor, almost six months earlier on November 12, 2020. Pet. Exh 11. Thus, as of the "determinative" eligibility date, the very last word Sisk had about his job status was one from his immediate supervisor who expressly did not establish a fixed, finite duration for his employment. She did precisely the opposite.

The Employer urges the Regional Director to disregard the proposal by Sisk's immediate supervisor of continued employment on the specious ground that the other emails relating to his employment also involved higher-level officials. Yet, Amy Buchanan was Sisk's immediate supervisor and, thus, an agent of the Employer. She was on other email traffic involving Sisk, was the first named recipient of Sisk's announcement to resign in May 2020 (Er. Ex. 13) and was the management official who notified the entire staff of his departure on June 30, 2021. Er. Exh 16. Given the lack of any documentation in Sisk's personnel file, or the email traffic regarding his conversion to part-time status, that Sisk was ever in a temporary status, this record, as a

whole, supports his eligibility to vote in the election, exactly as found by the Hearing Officer. Indeed, the very fact that Buchanan inquired in early June whether Sisk could be kept on only underscores management's understanding that his tenure was an open question.<sup>43</sup>

Under these circumstances, Sisk was, as the Hearing Officer found, certainly eligible to cast his ballot in the June 29, 2021, election. The Employer's Exception should be denied.

### CONCLUSION

For the foregoing reasons, we urge the Regional Director to deny the Employer's Exceptions in their entirety and adopt the Hearing Officer's Report and Recommendations.<sup>44</sup>

Respectfully submitted,



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<sup>43</sup> As noted, Sisk responded that he was "open" to continued employment, just as she had suggested. Tr. 265.

<sup>44</sup> In its Exceptions, the Employer asks the Regional Director to bifurcate its appeal by addressing the objections first and postponing a consideration of its challenges. As the record will reflect, this approach is contrary to the July 28, 2021, Order issued by the Regional Director in this case which, *inter alia*, directs that the challenges and objections be considered together. Further, we submit that this is nothing more than a transparent attempt by Duke to prolong the ultimate resolution of these matters and, we believe, to delay the issuance of a Certification.

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Brief in Opposition was served this 22<sup>nd</sup> day of October 2021, by electronic mail, on counsel for the Employer, Harrison Kuntz, Ogletree, Deakins, Nash, Smoak & Steward, 7700 Bonhomme Avenue, St. Louis, MO 63105.



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